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ABSTRACT

This volume presents nine papers read at a conference on affirmative action, sponsored by the Rockefeller Foundation and held at Columbia University in August 1982; a preface, summary paper, and list of participants are also included. Each paper addresses the issue of affirmative action within a different country and describes: (1) the policies and programs of the country; (2) the standards, laws, constitutional provisions, and court decisions to which the policies conform; (3) a brief historical background; (4) the rationale or philosophical underpinnings of the policy (e.g., compensation, previously flawed selection criteria, social utility); (5) how the policy and programs actually operate; (6) the extent of success; (7) the nature and extent of opposition; and (8) the expected duration of the program. By author and title, papers presented are: (1) Mah Hui Lim, "Malay Special Rights: 'Affirmative Action' in Malaysia"; (2) B. Sivaramayya, "Affirmative Action: The Scheduled Castes and the Scheduled Tribes" (India); (3) L. Adele Jinadu, "Federalism, Ethnicity, and Affirmative Action in Nigeria"; (4) Natan Lerner, "Affirmative Action in Israel"; (5) Dunstan M. Wai, "Internal Colonialism and Political Engineering in the Sudan"; (6) Klaus Hufner, "The Right to Education: The Case of the Federal Republic of Germany"; (7) Trivo Indjic, "Affirmative Action: The Yugoslav Case"; (8) Susan C. Bourque, "Peru: Affirmative Action for the Majority"; (9) William L. Taylor, "Affirmative Action in the United States"; (10) Jack Greenberg, "Affirmative Action in Other Lands: A Summary." (Author/KH)

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INTERNATIONAL PERSPECTIVES ON AFFIRMATIVE ACTION

A Bellagio Conference

August 16-20, 1982

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PREFACE

> When one has sinned and become guilty, he shall restore what he took by robbery, or what he got by oppression, or the deposit which was committed to him . . . he shall restore it in full, and shall add a fifth to it . . . .
>
> Leviticus 6:4-5

Throughout history man has always managed to find an excuse and a method to practice his inhumanity and oppression on his fellow man. But even as man fashioned newer and more sophisticated ways to practice injustice, he has, as the Biblical passage above suggests, at the same time tried to correct his past injustices. President Lyndon B. Johnson, in his now-famous 1965 Howard University commencement address, pointed out that "equal opportunity is essential, but not enough," as he urged the nation "to move beyond opportunity to achievement."

While President Johnson made what was thought to be a far-reaching statement when he said, "We seek . . . equality as a fact and equality as a result," it was President John F. Kennedy who first used the term "affirmative action" in Executive Order #10925 in 1961. Within the context of the executive order, the term was meant to suggest that the nation must take (affirmative) action to seek to overcome the present effects of past racial discrimination.

The term "affirmative action" was first used by an American president to describe an American phenomenon, but the practice had been used in many different countries for many years before Executive Order #10925. Although very little is known in the United States about the experiences of other countries, the fact is that methods we would term "affirmative action" are used around the world. These methods involve selected practices that take into account race, national origin, sex, handicap, poverty, or sometimes other characteristics, thus subordinating the role of so-called objective criteria such as grades, scores, education and experience.

The U.S. Supreme Court has, in each of its past 12 terms, had a major affirmative action case to decide and programs have been adopted and disputed in virtually every state without reference to the lessons that might have been learned from the considerable experience in other lands.

In August 1982, Columbia University School of Law and the Social Sciences Division of The Rockefeller Foundation convened a four-day International Conference on Affirmative Action. Twenty-seven distinguished scholars, lawyers, educators, and civil rights practitioners from ten countries met at the Bellagio Study and Conference Center on Lake Como, Italy, to explore the ways in which various countries depart from conventional selection criteria and procedures in education and employment in order to promote a range of social and political purposes. These purposes included power sharing, group reparations, redistribution, social integration, and increased immigration. The beneficiaries of the programs discussed were members of racial, religious, or ethnic groups, and women.

This working paper consists of the eight papers written for the conference and a summary by Mr. Jack Greenberg. The countries whose policies were selected for consideration and the individuals invited to write and present were: The Federal Republic of Germany, Prof. Klaus Hufner; India, Prof. B. Sivaramayya; Israel, Dr. Natan Lerner; Malaysia, Prof. Mah Hui Lim; Nigeria, Prof. L. Adele Jinadu; Peru, Prof. Susan Bourque; Sudan, Dr. Dunstan M. Wai; Yugoslavia, Prof. Trivo Indjic; and the United States, Mr. William Taylor.

Each scholar was asked to prepare a 25-to-30-page paper that examined the experiences within the country and to describe: 1) the policies and programs of the country; 2) the standards, laws, constitutional provisions, and court decisions to which the policies conform; 3) a brief historical background; 4) the rationale or philosophical underpinnings of the policy, e.g., compensation, previously flawed selection criteria, social utility; 5) how the policy and programs actually operate; 6) the extent of success; 7) the nature and extent of opposition; and 8) the expected duration of the program.

All of the papers were disseminated to the conference participants prior to the opening session and each presenter was asked to give a brief overview before the paper was discussed at one of the conference sessions. This procedure facilitated discussion and allowed the conferees to move quickly into examination of the characteristics of the country being presented. The discussions were lively and wide-ranging and dealt with many of the questions and issues always raised about affirmative action.

The first thing that had to be decided for discussion purposes was to arrive at a working definition of "affirmative action." Agreement was reached to use the definition put forth by Jack Greenberg: "special preference for members of a group defined by race, color, religion, language, or sex for the purpose of providing access to power, prestige, and wealth."

The conferees debated such perennial questions as: "Should the beneficiaries of such programs not only be members of a specific group but also be disadvantaged economically?" "Are such programs justified once the barriers and the discrimination and all the artificial impediments to a group have been removed?" "Should the beneficiaries of affirmative action programs be individuals who have not themselves been the victims of discrimination?" These questions and many more occupied the time of the participants and were discussed in an international context.

This conference could not have taken place without the special efforts of a number of individuals. First, thanks should go to Mr. Jack Greenberg, Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc., who first suggested the idea of an international conference; to Mr. Albert J. Rosenthal, Dean, Faculty of Law, Columbia University, who agreed to co-sponsor this event; and to my colleagues at the Rockefeller Foundation, Dr. Bernard E. Anderson, Director of the Social Sciences Division, and Dr. Phoebe H. Cottingham, Assistant Director of the Social Sciences Division, for their wise counsel and advice during the planning process. Special thanks to Ms. Deborah Greenberg, who served as co-

conference coordinator and who contributed immeasurably in all phases of the conference.

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MALAY SPECIAL RIGHTS: "AFFIRMATIVE ACTION" IN MALAYSIA

Mah Hui Lim

Introduction

The concept of affirmative action normally is associated with programs designed to assist minority groups that have been discriminated against and left behind in the course of the development of a society. A minority is not simply weak in number, but, more important, it is disadvantaged socially, economically, and politically. Clear examples of minorities are blacks and Asian-Americans in the United States, or scheduled castes such as harijans in India.

In the Malaysian case, affirmative action is aimed at improving the economic position of Bumiputras (literally, "princes of the soil"), who consist of Malays and other indigenous communities.[1] Bumiputras are not a minority in the conventional sense of the word as they not only constitute the numerical majority in society but also enjoy political dominance, even though they are economically disadvantaged. On the other hand, the non-Bumiputras--Chinese, Indians, and others who form 45 percent of the population--are economically better-off but politically subordinate to the Bumiputras. The members of the group that receives the benefits of affirmative actions are the ones who have the political power to legislate them. Here we find that the economically disadvantaged are politically powerful and vice versa. Given the ambiguity of who constitutes a minority, the concept is not officially employed in Malaysia.

While the above situation may seem a bit strange, it is by no means unique and can be found in countries such as Kenya, Uganda, and Indonesia. These countries share a few fundamental characteristics: they are

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postcolonial societies with ethnically divided populations, and the distribution of economic and political power runs along ethnic lines.

The indigenous community holds political power while the local immigrant and foreign communities enjoy economic power. This separation of economic and political power is a result of colonial policies and practices that were meant to keep the colonized population weak and divided. Under colonial rule, while the colonial power enjoyed political and economic dominance, it also nurtured separate sets of political and economic elites among the local population. Often the local political elites were former members of the indigenous aristocracy, while the economic elites came from the immigrant communities; both were, however, subordinated to the colonial rulers. But with independence this dichotomy asserted itself. The economically disadvantaged political elites set in motion policies and programs to redress this awkward imbalance and in the process brought about economic, political, and ethnic conflicts. The affirmative action programs of Malaysia can only be understood in this context.

Constitutional Status of Malay Special Rights

Malaysia's affirmative action program is guaranteed under Article 153 of the Federal Constitution, which states that it is "the responsibility of the Yang di-Pertuan Agong (i.e., the Paramount Ruler) to safeguard the special position of the Malays and natives of the States of Sabah and Sarawak and the legitimate interests of other communities."[2] It further stipulates that the Yang di-Pertuan Agong shall reserve for Malays and other natives a reasonable proportion of positions in the public service and educational institutions, scholarships, and trading or business permits or licenses (Malaysia, 1979:151-52). Article 89 also empowers state governments to declare certain areas as Malay reservation land, where only Malays are entitled to ownership (Malaysia, 1979:85-86). A proviso is, however, added that the total area under Malay reservation shall not exceed that available for general alienation, and the act shall not affect any land that is presently occupied by non-Malays (Malaysia, 1979:85-86). These rights are not only guaranteed in the Constitution, but their existence is also securely entrenched by the provision that they cannot be amended through the normal legislative process, which requires at least two-thirds majority support in the Parliament; in addition to this, the consent of the Conference of Rulers is required. Consequently, this provision makes it more difficult to amend the Special Rights Act than the Constitution itself. The one time when an amendment to Article 153 was made, in 1971, it only served to strengthen the constitutional status of Malay Special Rights. Under this amendment: (a) the status of article 153, inter alia, is removed from the domain of public discussion. It is seditious to question the principle and status of Malay Special Rights, and this applies even in Parliament;[3] (b) Special Rights were extended to the other natives of Sabah and Sarawak; (c) the Yang di-Pertuan Agong is entitled to increase the number of positions reserved for Malays and other natives in colleges, universities, and other tertiary educational institutions (Lee, 1978:380-81).

Historical Background[4]

The concept of Malay Special Rights originated with British colonial rule in the Federated Malay States in 1874. The philosophy underlying this idea is that even though colonialism was imposed on Malaya, the myth that Malays were still the rightful owners of the country should, and could, be maintained by granting them special status and "protection." There would be two layers of "protection": the Malay rulers who would continue to "protect" their Malay subjects, and, in turn, the British colonial government, which would "protect" the interests of the Malay rulers and the population from being overrun by non-Malays.

Britain had established colonial rule for purposes of trade and acquisition of raw material. The production of tin and rubber required wage labor that was not forthcoming from the Malay peasantry. Thus, foreign labor, as well as capital, was imported, thereby threatening to disrupt the life of the Malay peasantry. To minimize these disruptions, and to maintain a form of colonial rule that could still be viewed as in the interest of the Malays, the concept of "protection" was created. Malay peasants and fishermen would be "protected" in their traditional mode of existence. By the same token, this "protection" prevented them from engaging in modern economic activities and consequently left them behind in the process of economic development. The Malay ruling elites were also "protected" in matters of governance by allowing them to retain symbolic sovereignty and offering them handsome economic compensation.[5]

The whole philosophy of British colonial rule in Malaya was, therefore, to set itself up as the "protector" of Malay rights. Colonial rule was seen as a form of trusteeship for Malaya, and this concept found expression in British colonial agricultural, educational, and employment policies.

Land Rights

Land in precolonial Malaya was a factor of production, not a commodity with market value. Peasants had rights to land as long as they cultivated it and met the exactions required by the Malay aristocracy (Lim, 1977:17; Wong, 1975:chap. 2). Under this system, foreigners were regarded as infidels and were not entitled to land rights. With the introduction of estate agriculture and mining operations, the British introduced the concept of private property that was later formalized under the Torrens Land Laws. Under the Torrens system, all land was treated as crown land, and Malay rulers had the power to lease it to private individuals upon payment of taxes. Land titles were issued providing the landholders with permanent, heritable, and transferable rights to land. These titles took precedence over customary proprietary rights, and foreigners were now permitted to own land. The main beneficiaries of this new land code were, no doubt, the British and Chinese miners and planters. Rubber companies expanded their operations and bought Malay peasants' land extensively, causing concern among the Malays as well as the colonial government, which preferred to perpetuate a Malay yeoman peasantry. In 1913, the Malay Reservation Enactment was passed that designated certain areas to be reserved for Malay ownership only.[6] The act also prohibited non-Malays from holding mortgages on Malay reservation land.

While this law protected Malays from losing land to non-Malays, it also worked against their economic welfare. First, the value of Malay reservation land was depressed, as it was not acceptable as collateral by non-Malays; this aggravated the problem of credit supply for Malay peasants. Second, it did not protect the poor Malay peasants from losing their land to richer Malay peasants and landlords, many of whom were aristocrats. In other words, it strengthened the position of Malay landlords vis-a-vis the poorer peasantry and promoted increasing differentiation within the Malay population. Finally, the Rice Land Act, related to the Malay Reservation Act, prohibited Malay peasants from cultivating any cash crop other than rice on reservation land. Ostensibly, these laws were meant to "protect" the interests of the Malay peasants; in fact, they were meant as much to keep the Malay peasants from planting rubber and becoming a threat to the British plantation industry. The British intended for the Malays to continue as padi planters, providing cheap rice for the burgeoning labor force in the estates and tin mines. This was well articulated by the director of agriculture in 1934:

> Our trusteeship for the Malay people demands that we administer the country on lines consistent with their welfare and happiness, not only for today but for the future ages. That end will be attained by building up a sturdy and thrifty peasantry living on the lands they own and living by the food they grow than by causing them to forsake the life of their fathers for the glamour of new ways which put money into their pockets today but leave them empty tomorrow, and to abandon their rice-fields for new crops which they cannot themselves utilise and the market for which depends on outside world conditions beyond their orbit (cited in Roff, 1974:125).

Education Rights and Public Employment

This concept of "protection" extended into the fields of education and public employment. To increase the effectiveness of colonial rule, the British nurtured a local ruling class, in this case the Malay aristocracy, to be junior partners in administration. A Malay College in Kuala Kangsar was established in 1905 to provide English education and upper-class English culture to children of Malay aristocrats who would supply the pool of subordinate administrative officers in the bureaucracy (Tilman, 1969:230). The colonial administration was dominated by the Malayan Civil Service (MCS) and supported by a lower-echelon bureaucracy, the Malayan Administrative Service (MAS). The former was filled almost completely by British with a few Malays promoted from the MAS; the latter was exclusively Malays, recruited mainly from Malay College. Both MCS and MAS were inaccessible to non-Malays. The declared policy was to favor the employment of Malays in government administration. This not only lowered the cost of administration but also served to mollify the Malay aristocracy who had lost political power. This ethnic imbalance in public employment was reflected in the composition of central government officials in the Federated Malay States in 1931: 61 percent were Malays, 20 percent Europeans and Eurasians, and 19 percent non-Malays (Loh, 1975:110).

While Malay aristocrats and their children were given a good English education, the ordinary Malays were provided with poor-quality Malay education to continue in their occupations as peasants. This was confirmed by a British official who declared:

> The aim of the Government is not to turn out a few well-educated youths, nor yet numbers of less well-educated boys; rather, it is to improve the bulk of the people and to make the son of the fisherman or peasant a more intelligent fisherman or peasant than his father had been, and a man whose education will enable him to understand how his own lot in life fits in with the scheme of life around him (cited in Loh, 1969:173-74).

Despite the meager investment in Malay education, it can still be said that the government had assumed "special responsibilities" for educating the Malays. Malay schools were the only ones that were fully financed by the colonial government (apart from the English-medium Malay College). Chinese education was almost completely funded from Chinese private donations, while English education was sponsored mainly by Christian missionaries with partial government subsidy (Loh, 1975; Tilman, 1964:60).[7] Tamil education, even poorer in quality than Malay education, was provided by estate owners with some government aid.

To sum up, British policy of Malay Special Rights was born out of the need to assuage the Malay populace into whose life they had rudely intruded. According to official rhetoric, these rights were meant to protect Malays from the disruptive influence of economic development and to compensate the Malay rulers for their partial loss of political power. By dividing the population into two components--indigenous (Malay) and immigrant (non-Malay) communities--and setting themselves up as the "protectors" of the Malays, the British were able to sow seeds of suspicion and separatism between the two communities. The extent to which they succeeded in doing this is evident from the fact that the Malay elites preferred the continuation of British colonial rule, after the defeat of the Japanese, in order to ward off possible challenges from non-Malays.

Effects of Protection and Special Rights

Far from promoting the interests of the ordinary Malays, these special rights and protective policies kept the Malays behind while the other communities made economic progress. This is evident from the distribution of occupation, income, and ownership by ethnic division at the end of colonial rule. Examining table 1, we find that Malays were concentrated in the lowest-paying occupations--agricultural workers and fishermen: 73 percent of the Malays were in this category, compared with 38 percent of the Chinese and 44 percent of the Indians. Only 3 percent of the Malays were sales workers, whereas 16 percent of the Chinese and 9 percent of the Indians were in this category. Similarly, we find that 10 percent of Malays were industrial workers, compared with 28 percent of the Chinese and 22 percent of the Indians. The percentage of Malays, Chinese, and Indians in the professional and administrative categories were about equal--3 percent, 5 percent, and 5 percent respectively. This uneven distribution of occupational status resulted in ethnic income inequality. In 1957, the mean income per Malay household was $139 per month, compared with $300 per month for Chinese and $237 for Indians (Snodgrass, 1980:83). (All dollars here refer to the Malaysian ringgit.)

Table 1

Distribution of Occupation by Ethnicity--1957, 1970, 1980

(%)

	1957[1]			1970			1980		
	M	C	I&O	M	C	I&O	M	C	I&O
Professional and technical	2.6	3.2	3.7	4.3	5.2	5.6	5.4	5.6	6.2
Administrative and managerial	0.4	2.0	1.3	0.5	1.8	1.2	0.7	1.9	1.2
Clerical and related workers	1.6	3.7	4.4	3.4	6.3	8.1	7.7	7.1	5.3
Sales and related workers	2.8	15.6	8.9	4.7	15.3	9.1	4.5	19.2	6.8
Service workers	4.7	7.9	13.4	6.8	8.6	11.0	7.6	9.0	8.6
Agricultural workers	72.8	37.7	44.4	62.3	21.2	41.6	45.2	18.6	37.6
Production, transport, and other workers	10.4	27.8	21.7	18.0	41.6	23.4	29.0	38.6	34.3
%	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
N =	1023.7	771.9	369.2	1477.6	1043.6	329.1	2211.5	1558.0	494.9

Sources: Federation of Malaya, 1957 Census, table 14,
Malaysia (1981), Fourth Malaysia Plan, p. 59.

Note: 1. For 1957, the percentages add up to a little less than 100%.
M = Malays; C = Chinese, I&O = Indians and others.

In terms of ownership of the economy, Malay ownership was concentrated in the subsistence agriculture sector, with 67 percent of it owned by Malays (Puthucheary, 1960:5). Their participation in the modern sector was dismal. In 1957, Malay business constituted only 10 percent of the 89,000 registered business establishments and accounted for only 1.5 percent of the capital invested in registered companies (Malay Mail, February 3, 1960).[8]

Although Malays were economically disadvantaged, they enjoyed political superiority, having been the favored political heirs of the British. Hence, when decolonization began, a long and complex bargaining process took place between Malays who enjoyed political privilege and non-Malays who had economic advantage; each traded one commodity for the other. A final compromise was reached wherein non-Malays, in return for receiving citizenship based on the principle of jus soli, agreed to having special rights conferred on the Malays in order to uplift their economic position. Furthermore, non-Malays accepted Malay as the national language as well as a national educational policy that made the teaching of Malay compulsory in all schools. The Reid Commission, which was originally charged with drafting the Federal Constitution for independent Malaya, provided for Special Rights to continue de facto and de jure but without constitutional status. The commission also recommended that Special Rights should continue for a period of 15 years, after which it should be reviewed with the objective of preparing for eventual abolition (Means, 1972:39). This was vehemently opposed by the Malays, who succeeded in having these two recommendations deleted. Thus, Malay Special Rights were finally enshrined in Article 153 of the Federal Constitution of 1957.

Postindependence Special Rights, 1957-70

In discussing the postindependence Special Rights Program, it is necessary to distinguish two phases--the watershed marked by the May 1969 racial riots. The riots signaled the failure of the Special Rights Program, from 1957-69, alienating both Malays and non-Malays. The Malays felt that not enough was accomplished in this program, while the non-Malays resented the fact that they were being discriminated against. How this came about shall be our next area for investigation.

If Malay Special Rights were used by the British colonial government to "protect" Malays, which in effect also meant to exclude them from modern economic activities, they were now adopted by the postcolonial government (the Alliance government)[9] to help Malays enter into the modern sector and to attain economic parity with non-Malays; the concept of "protector" was maintained, only this time the "protectors" were the Malay sultans and politicians--a practice that continues to the present.

Article 153 specifically refers to the need for Malays to make inroads into the fields of public service, education, and business. In the initial stages, the government paid most attention to public service employment because it constituted the center of power and was easiest to achieve. The goal called for a recruitment ratio of four Malays to every non-Malay in the Malayan Civil Service (MCS); a 3 to 1 ratio in the Judiciary, External Affairs, and Custom Services; no quotas were set for the professional and technical service (Means, 1972:46). Substantial progress was made in the Malayanization of the MCS.[10] Table 2 shows that in 1957, expatriates constituted 61.7 percent of the MCS, Malays 34.6 percent, and non-Malays 3.6 percent: by 1970, there were no expatriates, Malays formed 86.6 percent, and non-Malays 13.4 percent. However, in other branches of the civil service, particularly in the professional and technical divisions, comparable percentages were not found, so that taken as a whole, non-Malays still outnumbered Malays in the senior bureaucracy (Division I officers). Table 3 shows that expatriates' share of the senior bureaucracy dropped from 61 percent to 0 percent, while Malays' share increased from 14.1 percent to 36.3 percent, and non-Malays' from 20.2 percent to 57.6 percent for the period between 1957-68.

Education

Education in postindependent Malaya has increasingly come under the control of the government, which finances and regulates it. In the first three five-year plans between independence and 1970, educational

Table 2

Ethnic Composition of the Malayan Civil Service, 1950-70

(%)

Ethnic Group	1950	1957	1963	1970
Malays	21.4	34.6	86.2	86.6
Non-Malays	0	3.6	10.7	13.4
British	78.6	61.7	3.1	0
Total %	100.0	100.0	100.0	100.0
N =	145	358	290	696

Source: M. Puthucheary, 1978:54.

Table 3

Ethnic Composition of Division I Officers

(%)

	1957	1962	1968
Expatriate	61.0	14.1	0
Malays	14.1	29.3	36.3
Chinese	13.2	34.0	36.1
Indians	7.0	15.9	21.5
N =	2761	2902	4308

Source: Means, 1972:47.

expenditure averaged 7.6 percent of the total public development expenditure (Snodgrass, 1980:50). Without access to ownership of the economy, as is the case with the majority of Malays, education becomes the major instrument for social mobility. The combination of these two factors makes it necessary and possible for the government to emphasize the provision of Special Rights for Malays in the field of education.

Until independence, the major beneficiaries of English education were the non-Malays who had greater accessibility to it by virtue of being located in urban areas. Of those children born in 1960 and enrolled in primary schools, only 17 percent of Malay children were enrolled in English schools, compared with 25 percent for Chinese and 49 percent for Indians (Kementerian Pelajaran, 1973:27).

Various efforts have been made to improve educational opportunities for Malays: scholarships are given generously to Malay students at all levels of education; special institutions such as the RIDA Training Center were established to provide vocational and professional training for Malays; admission standards for secondary and tertiary institutions have been lowered for Malays; the whole educational system has been reorganized, including the conversion of all English-medium schools to Malay-medium schools beginning with grade 1 in 1970.

The principal institution set up for educating Malays is the RIDA Training Center, which became the MARA Institute of Technology (MIT) in 1967. In the initial years, little concrete action was made to train Malay professionals and businessmen. In 1964, only 67 students were enrolled in the RIDA Training Center; by 1966, the enrollment increased to 394, two years later it soared to 2,450, and it was expected to reach 4,000 by 1970 (KEB-2, 1968[b]:4). RIDA/MARA not only trains students but also grants scholarships to Malay students for studying in other institutions. In the first 12 years, it provided only 12 scholarships, but between 1966 and 1968, the number of tertiary scholarships provided jumped to 487 (KEB-2, 1968[b]:12).[11]

Two events account for these dramatic changes--the First and Second Bumiputra Economic Congresses held in June 1965 and September 1968 respectively. These two congresses can be regarded as the most important events challenging the government to implement the Malay Special Rights Program with greater speed and zeal. Out of these congresses, RIDA was reorganized into MARA and given greater economic and political clout; Bank Bumiputra, FAMA (Federal Agricultural and Marketing Authority), and PERNAS were established.

While MARA was set up almost exclusively for Malays, the other tertiary institutions were not. In the sixties, the only university in Malaysia was the University of Malaya. Its student composition in 1963-64 was 21 percent Malays, 60 percent Chinese, and 19 percent Indians (Snodgrass, 1980:248). With the affirmative action program, the intake of Malay students grew steadily, and by 1970, when two other universities were established (Universiti Sains and Universiti Kebangsaan), the student composition in the local universities was 40 percent Malays, 49 percent Chinese, and 11 percent Indians and others (Malaysia, 1973:193).

The issues of national language and education featured prominently in the bargaining process between Malays and non-Malays prior to 1957. A compromise was struck; Malay would be taught as a compulsory subject in all schools after independence and would become the sole official language after 1967.

The policy of creating a national educational system and the use of a national language was infused with political and economic considerations. As Silcock noted:

> The English educated Malays could capture power only by coming to terms with the Chinese. Having a majority of the electorate, as well as a greater participation in the British system of government, they had superior bargaining power, and they realized that emphasis on English education would favour the urban and non-Malays. They could not, however, press for a completely Malay system of education without alienating the essential minimum of Chinese support. As a result, a mixed system with gradual pressure toward Malay as a national language was introduced (cited in Snodgrass, 1980:243-4).

Special Rights: Penetration into Private Industry

Compared with the public service and educational sectors over which it has greater control, governmental attempts to force the private sector to increase Bumiputra participation are more difficult to implement. Nevertheless, three major sets of strategies have been used toward this end: (1) the government has legislated Malay quotas for the issuance of trading/business licenses and permits, ownership of equity, and employment; (2) it provides special assistance such as credit, training, and business sites to Malay businessmen; (3) it undertakes responsibility to acquire shares in private corporations on behalf of Bumiputras. While all three strategies have been applied in the pre- and post-1970 periods, the third strategy is given more emphasis in the latter period.

Business Licenses

Article 153 empowers the Yang di-Pertuan Agong to reserve a reasonable proportion of business licenses and permits for Bumiputras. Transport and construction were the first industries affected by this ruling. A Road Traffic Ordinance was passed in 1958 requiring that all new transport licenses be issued to Malays until their share in the industry became equivalent to their share of the total population in each state. Thus, between 1958-68, 52 percent of all new taxi licenses (2,319) were issued to Malays, leading to the fulfillment of the proposed targets in all but five states (KEB-2, 1968 [b]:57; 1968 [c]:69). In the road haulage sector, all applications for operating A- and B-category trucks (i.e., larger trucks) were rejected outright unless they had some Malay participation. By 1968, Malays held 242 of type A, 395 of type B, and 1,186 of type C trucks, in addition to 387 licenses issued to joint ventures between Malays and non-Malays (KEB-2, 1968 [b]:57). Malay participation in bus transportation was less encouraging; in the same period, the number of Malay bus companies increased from 13, with a paid-up capital of $1.2 million, to 34, with a total capital of $5.7 million (KEB-2, 1968 [b]:58).

Government expenditures on infrastructure averaged 44 percent in the first three development plans, and this provided enormous opportunities for private contractors. Not surprisingly, Malays wanted a share of the pie, and the Malay Chambers of Commerce pressured the government to allocate no less than 25 percent of all government contracts to Malays (Golay, 1969:363). The different state governments promulgated their own directives to employ Malay contractors. In Johore, Malay contractors automatically received tenders ranging from $500 to $5,000; in Negeri Sembilan, they would be given contracts if their prices were no more than 10 percent of the non-Malay offers (KEB-2, 1968 [b]:93, 115). As a result of these measures, Malay firms accounted for 34 percent of the number of contractors and 21 percent of the total value of output of construction establishments with work of less than $100,000 (Ismail, 1974/75:14).

Malaysia is the world's largest producer of tin, yet it was not until 1978 that her tin-mining industry came under local ownership and control. Tin mining is highly capital intensive, characterized by a high degree of economic concentration in a few large corporations. Small and medium-sized miners, predominantly Chinese, play a secondary role, while private Malay miners are insignificant. In 1958, the National Land Council recommended the government to prospect for tin in Malay reservation land and encouraged Malays to take up mining leases. But little was accomplished. In 1965, only 10,551 acres, or 2 percent of mining land, was leased to Malays, and of this, less than 1,000 acres were actually worked by Malays (KEB-1, 1965:123).

The exploitation of timber resources in Malaysia gained importance only in the 1960s, much of this industry controlled by non-Malays. In 1964, of the 1,230 licenses and permits issued for timber exploitation, only 428 (35 percent) were held by Malays, covering 37 percent of the total acreage, but most of this was subleased to non-Malays. The First Bumiputra Economic Congress resolved that no less than half of all new leases be granted to Malays, and this was accordingly implemented. In 1966 and 1967, 54 percent and 58 percent of all new timber licenses were granted to Malays (KEB-2, 1968 [b]:34-37).

The above statistics in the various industries seem to indicate considerable success in Malay participation, but the reality is less comforting. It is revealed time and time again, in almost every Malay economic conference, that most Malays resell their licenses to non-Malays for a fee or allow their names to be used as fronts for non-Malays who run the enterprise and pay a tribute to the Malays. This problem of sleeping partnership, termed Ali-Baba or Ali-John,[12] is as intractable as it is ubiquitous. It results from a policy that is more concerned with meeting the targets on paper than in reality. Entrepreneurs cannot be created overnight, particularly when they lack capital, technical and organizational know-how, and business connections. Under such circumstances, the Malays who are granted licenses find it easier to sublease them for a lucrative fee than to operate the businesses themselves.[13]

For example, in the timber industry, it was revealed that 99 percent of the logging firms in Kelantan are run on an Ali-Baba basis (NST, April 19, 1978); in Perak, less than 20 percent of the Bumiputras were directly involved in their mining and logging enterprises; in Penang, less than 20 percent of the registered Bumiputra contractors operate their own businesses (NST, April 21, 1975); in Pahang, only 4 percent of Bumiputra contractors carry out the jobs offered to them (NST, November 30, 1978). The Socio-Economic Research Unit of the Prime Minister's Department identified the wholesale trade and construction industries as most beset with this problem (NST, December 23, 1979). Repeated calls have been made to penalize Bumiputras who abuse their privileges through indulging in Ali-Baba practices, but it is obvious that the problem can neither be wished nor warned away.

In the field of commerce, foreign trade is dominated by foreign capital, while local trade is controlled by Chinese merchants. While Malays were encouraged to enter into commerce, little was given by way of support. As of 1965, RIDA provided only $1.6 million in loans to Malay retail shops (KEB-1, 1965:82). Some efforts were made to cut into the Chinese monopoly of the rice-milling and marketing business through imposition of quotas, and the use of cooperatives. In 1960, merchants were required to purchase one ton of domestically milled rice from cooperative or government millers for every two tons imported (Golay, 1969:380). The minister of agriculture, Aziz Ishak, in the early sixties, spearheaded the cooperative movement to displace Chinese middlemen, and attempts were made to withdraw rice-trading licenses from Chinese merchants. This evoked extreme protest from the Chinese merchants, who were able, through the Malayan Chinese Association, to pressure the prime minister to expel Aziz Ishak from the Cabinet in 1962, to be followed later by his detention (Aziz, 1977).

Provision of Assistance--Credit and Training

It is all well and good to encourage Malays to go into business and reserve quotas for this purpose, but unless they have capital and know-how, the programs remain as empty shells. The lack of capital, technical, and entrepreneurial skills have been identified as the major problems facing Malay businessmen, but little has been done to overcome them.[14] Before 1965, the only major source of credit came from RIDA, whose total value of credit to 1,780 establishments amounted to only $6.2 million as of 1965 (KEB-1, 1965:82).[15] At the First Bumiputra Economic Congress, the proposals to establish Bank Bumiputra and to increase RIDA's credit facilities were accepted and implemented. As a result, between 1965-68, RIDA dispensed loans amounting to $11.3 million (Beaglehole, 1969:235). In RIDA/MARA's 20 years of existence (1951-70), a total of $70 million in credit was given (Malaysia, 1976:192). Just how inadequate all this was can be seen from the fact that in 1968, the total amount of loans from commercial banks in Malaysia was $1,653 million, of which well under 4 percent went to Bumiputras (Treasury, 1975/76: Appdx. 9.2; 1979/80: Appdx. 6.2).

Training and technical assistance constitute the other major forms of assistance given to Bumiputra businessmen. The agencies performing this role are RIDA/MARA, the National Productivity Center (NPC), Malaysian Industrial Finance Ltd. (MIDF), and Malaysian Industrial Estate Ltd. (MIEL). NPC concentrates on providing short-term training courses in technical and management aspects for small businessmen, while RIDA/MARA concentrates on formal training of professionals. All these agencies also assist by way of providing consultancy services and feasibility studies.

Ownership and Management

Most of the programs described so far are aimed at helping small businessmen, with the exception of education and employment opportunities that benefit the professionals more. It was observed at the First Bumiputra Congress that little was done in regard to taking over ownership and control of the corporate sector, which was still monopolized by foreign capital. It noted that "we should judge the success or failure of the policy of increasing participation in industry by Bumiputra on the question of ownership of companies. If Bumiputras do not own their companies or do not share in the ownership of Malaysian companies, then this policy is a failure" (KEB-1, 1965:105).

The first measures taken to acquire ownership of large corporations came in 1961 with the establishment of Syarikat Permodalan Kebangsaan Bhd (National Investment Corporation). In 1965, the minister of commerce and industry reported that his ministry required pioneer companies to reserve at least 10 percent of their shares for Malays in order to be granted licenses for operation. The National Investment Corporation would buy shares allocated for Bumiputras and then resell them to private Bumiputras. Between 1961-67, the corporation was allocated $8.1 million shares and at the end of 1966, it held $4.6 million and had disposed of $3.5 million of the shares to Malay individuals (Golay, 1969:382-83).

Two other institutions that play a role in expanding Bumiputra investments are Tabung Haji (Pilgrims Fund), established in 1962, and MARA Unit Trust, started in 1967. Tabung Haji mobilizes funds from Muslims, who save to make a pilgrimage to Mecca, for portfolio investments. By 1967, it had $5.7 million in deposits, half of which were invested in shares of private corporations (Golay, 1969:383); three years later, the deposits stood at $28.5 million, contributed by 60,500 individuals (Thillainathan, 1976:52). In 1968, MARA Unit Trust launched its first Unit Trust Fund, valued at $1.5 million, which was oversubscribed; 80 percent of the subscribers came from the rural areas.

Clearly, the investment of a few million dollars could hardly make a dent in the ownership structure of large corporations, and this was revealed in two studies. Despite the 10 percent Malay ownership quota, Lindenberg's study of pioneer companies showed that less than 1 percent of the equity was held by Bumiputras (1973:254); and the government revealed for the first time that of the total share capital of all limited corporations in 1969, only 1.5 percent was owned by Malays, 24.3 percent by non-Malays, and 62.1 percent by foreigners (Malaysia, 1971:40).

Compared with the progress made in share ownership acquisition, the appointment of Malays on boards of directors of large corporations was substantial. In 1967, 10 percent of the directors in Lindenberg's 50 percent sample of pioneer companies were Malays, 60 percent of these were former bureaucrats and/or politicians (1973:258, 261); in 1974, 67, or 12 percent, of the 579 directors of the 100 largest corporations in Malaysia were Malays (Lim, 1981:54). The appointment of Malay directors is one of the few areas in which the Malay Special Rights Program is quite willingly implemented. What accounts for this discrepancy between ownership and directorship participation? In an economy where the government is a major client, and also increasingly regulates the private sector, corporations are eager to appoint prominent Malays, especially politicians or former civil servants, to their boards to facilitate transactions with the government. These Malay directors are handsomely rewarded for the role they perform, and the fact that these spoils have been limited to a few individuals has not gone unnoticed by the smaller Malay businessmen. At the Second Bumiputra Congress, the Selangor Chambers of Commerce criticized companies for appointing Malay directors for purposes of lobbying and window-dressing and also prominent Malays who have monopolized these directorships. It further suggested that a board be set up to allocate these directorships to benefit more Malays (1968 [a]:14-15).

Rural Land Development

Article 153 focuses on redressing economic backwardness of Malays, which is more obvious in the urban sectors; nevertheless, the rural Malays are afflicted with problems of low productivity, poverty, and landlessness. Because rural Malays form the bulk of the Malay electorate, the government can ill afford to neglect their welfare; this is shown in the amount of expenditure spent on agricultural and rural development, which averaged 20 percent of the total public development expenditure in all the plans between 1956-70 (Snodgrass, 1980:50). In contrast, commerce and industry received an average of 2 percent for the same period. The biggest category in rural and agricultural development expenditure goes to the opening of new land for Malay peasants. This program is spearheaded by the FELDA (Federal Land Development Authority), established in 1956, and to a lesser extent by other state land schemes. FELDA alone developed 186 schemes involving 37,435 families on 812,684 acres of land between 1956-76 (Snodgrass, 1980:179). In theory, land development schemes (with the exception of the Malay reservation land) are not classified under the Special Rights Program and are, therefore, open to other ethnic groups; in practice, they are meant for Malays. Of the 17,975 families FELDA resettled by 1970, 94 percent were Malays (Wikkramatileke, 1975:115).

Racial Riots of 1969 and the New Economic Policy

It is no exaggeration to say that the Malay Special Rights Program represents the most explosive issue in Malaysian politics. It has caused resentment on the part of both Malays and non-Malays. On the one hand, non-Malays were resentful that they were being discriminated against for too long. They found it increasingly difficult to obtain scholarships, admission into higher educational institutions, and employment in public service.

The inability of the various communities to arrive at a modus vivendi spawned mutual distrust and resentment, which eventually erupted into an ugly racial confrontation in 1969. Originally, the government accused the communists of starting the riots (Abdul Rahman, 1969). Later, it changed its tune and recognized that the root cause was its own failure to solve the problem of economic inequality between Malays and non-Malays.[16]

A direct result of the riots was the promulgation of the New Economic Policy, based on the philosophy articulated at the First Bumiputra Economic Congress, which recognized the limitations imposed by a laissez-faire economy in promoting the development of a disadvantaged class. The Congress specifically proposed increased government intervention and regulation to promote Malay economic interests, a strategy that found expression in the explosion of public enterprises after 1970. The lower-class Malays also expressed their disenchantment with the government by giving their support to the Malay opposition party, Pan Malayan Islamic Party (PMIP), in the 1969 elections. The Chinese released their pent-up frustrations by rejecting the Malayan Chinese Association and voted for non-Malay opposition parties. Even though the Alliance government won the elections, it suffered a significant setback. The political protest and challenge launched by the non-Malays through the elections threatened the Malays, who were already feeling economically insecure and resentful. This double threat precipitated the racial riots that came a day after the election results were announced.

The riots forced the Alliance government to reconsider its laissez-faire economic philosophy and strategy of consociational politics, and resulted in the following changes:

1. It led to constitutional amendments that, inter alia, further strengthened the status of Malay Special Rights referred to earlier in the paper.

2. The promulgation of the New Economic Policy (NEP), which gives added vigor and clearer guidelines to improve the economic lot of the Malays. Two objectives were spelled out in the Second Malaysia Plan: the eradication of poverty, and the restructuring of the economy so that Bumiputras would have at least 30 percent employment in, and ownership of, the economy by 1990.

3. The realignment of political parties through the co-optation of opposition parties into a broad coalition, called the National Front, under the hegemony of UMNO.

Corporate Ownership

The most significant aspect of the New Economic Policy is the participation of the government in corporate ownership through its state enterprises. To meet the objective of 30 percent Bumiputra ownership, the financial allocations for existing and new state enterprises were increased substantially. For example, the MARA's and the MIDF's budgets were increased from $51 million and $16 million respectively to $184 million and $100 million between the First and Second Malaysian Plans (Malaysia, 1971:69; 1973:99). Komplex Kewangan was formed to expand MARA's investment activities. Other new institutions established to spearhead corporate ownership, and which were generously funded, were PERNAS (Perbadanan Nasional Bhd.--National Corporation, $150 million), SEDCs (State Economic Development Corporations, $193 million), UDA (Urban Development Authority, $160 million), MISC (Malaysian International Shipping Corporation, $107 million), BPMB (Bank Pembangunan Malaysia Bhd. and others, $100 million) (Malaysia, 1973:99). Together, these institutions consumed 10.2 percent of the total public development expenditure for 1971-75, compared with a mere 2.2 percent in the preceding five years (Malaysia, 1971:69; 1973:99). Despite these measures, by the mid-1970s, $353 million of share capital in approved limited companies were reserved for Bumiputras, but only half were taken up, and in 1973, only 6 percent, or $41 million shares, in pioneer companies were owned by Malays (Malaysia, 1973:145, 151). Therefore, further impetus was given to this program with the establishment of the Bumiputra Investment Foundation and its investment company, Permodalan Nasional Berhad (PNB), which was allocated $500 million capital in the Third Malaysia Plan and increased to $1,500 million in the Fourth Malaysia Plan (Malaysia, 1981:241). PNB buys shares in the open market or shares reserved for Bumiputras in corporations and then resells them to Bumiputras in the form of unit trust. To prevent the immediate resale of shares to non-Bumiputras, which would defeat the purpose of Bumiputra ownership, the owners are allowed to sell only through the unit trust. In January 1981, the government announced a scheme offering 31 percent or $1.5 billion worth of its total shares for sale to private Bumiputra interests through PNB (NST, January 10, 1981). To enable people to take advantage of this offer, Bumiputras were eligible for loans of up to 80 to 90 percent of the value of shares from Bank Bumiputra and Malayan Banking Bhd. (NST, May 30, 1980; Star, May 28, 1980). It was estimated that as many as 350,000 Bumiputras participated in this scheme (NST, January 15, 1981). PNB has become one of the leading Bumiputra investment institutions, having acquired $487 million shares in 60 companies as of February 1981 (NST, February 4, 1981). The other leading investment agency is PERNAS, established as a holding company in 1969. Between 1971-80, it acquired equity of over $500 million in mining, construction, trading, plantation, and finance industries (Malaysia, 1981:67). PERNAS, beginning in the mid-1970s, started to acquire controlling interests in Sime Darby Holdings and London Tin Corporation, one of the largest plantations and the largest tin-mining corporation in Malaysia. PERNAS has equity participation in 37 companies, managed through eight wholly owned subsidiaries, and employed, at the end of 1980, 16,593 persons (8,741 Bumiputras) (Malaysia, 1981:67). Through one of its major subsidiaries, Malayan Mining Corporation, it operates 37 tin dredges, representing 71 percent of the total dredges in Malaysia (Malaysia, 1981:315). Despite its widespread equity participation in 37 companies, its financial management has been less than desirable. The Auditors General Report on PERNAS Group's financial performance showed that they only made a total profit of $2.8 million (Rocket magazine, published by the Democratic Action Party, June 1981).

Between 1971-80, Bumiputra share in corporate equity grew at an average annual rate of 31.4 percent, from 4.3 percent to 12.4 percent. Bumiputras had taken control of the banking, financial, plantation, and mining sectors. In banking and finance, the government owned 77.4 percent of the local banking industry and 50 percent of the total banking industry (FEER, May 8, 1981:74; April 2, 1982). In insurance, out of a total of 36 insurance companies in Malaysia, Bumiputras have interest in 32; they have more than 51 percent equity in seven and more than 10 percent in eleven (MCA, 1980:2). In the estate sector, of the largest plantation companies, the government has controlling interest in Sime Darby, Gurthries, Boustead, Highland and Lowlands, Barlow, and Harrisons and Crosfield (FEER, August 8, 1980; October 9, 1981; February 27, 1981; NST, September 9, 1981; June 11, 1982). In tin, PERNAS, in partnership with Chartered Consolidated, took control of London Tin Corporation and reconstituted it to become Malaysian Mining Corporation, the largest tin producer in the world. In 1981, Malaysian Mining Corporation merged with Malayan Tin Dredging, a move to increase Bumiputra controls of the latter without having to buy its shares (FEER, September 4, 1981).

Credit

In extending Bumiputra control over the economy, the government followed a two-pronged strategy. In strategic corporate sectors such as banking, plantations, and mining, where massive acquisition of equity is necessary, state corporations and public agencies (like Pilgrims Fund, Police Cooperatives) are principal vehicles for takeover. In the other sectors such as construction, transport, and trade, where economic concentration is less marked, ownership by small and medium-sized businesses is encouraged. Here credit becomes vital to Bumiputra small businessmen. Through ownership and regulation of the financial sector, the government has insured the expansion of credit for Bumiputras.

With the New Economic Policy, banks were directed to increase their lending to Bumiputras. Initially, in August of 1974, banks were required to provide at least 12 percent of their loans to Bumiputras; this was raised to 20 percent in October 1976 (Bank Negara, 1979:164-65). As a result of this measure, bank credit to Bumiputras rose from $149 million (5 percent of the total credit) in 1971, to $4,780 million (20.6 percent) in 1980, i.e., at an average of 50 percent per year (table 4). As of January 1980, a total of $1.9 billion in loans have been dispensed to Bumiputras (NST, April 8, 1980).

Table 4

Credit Assistance--1971 and 1980

($ million)

Institution	1971		1980	
	M	N-M[1]	M	N-M
Commercial banks and finance companies	149.3	2,851.4	4,780	18,440
Credit Guarantee Corporation (CGC)[2]	-	-	(150)	(200)
MARA	15.0	-	50.3	-
UDA	-	-	7.4	-
MIDF	13.1	56.9	39.7	-
BPMB	-	-	129.3	-
Petty Traders Program	-	-	17.3	-

Source: Malaysia (1981), Fourth Malaysia Plan, p. 66.

Notes: 1. M = Malays; N-M = Non-Malays

2. CGC was formed in 1972; UDA (1972); BPMB (1974); Petty Traders Program (1972).

Commercial banks were also initially required to lend at least 3 percent of their total loans to small enterprises; this quota was raised to 10 percent in June 1975. In July 1972, the government set up the Credit Guarantee Corporation (CGC), an institution that underwrites a guarantee for 60 percent of the loans given by commercial banks to small businessmen, with the remaining undertaken by the banks themselves. In 1973, CGC guaranteed 617 loans worth $1.9 million, with about 53 percent of the loans going to Malays (Malaysia, 1973:15); by December 1977, it guaranteed 54,591 loans worth $480.4 million, with 67 percent of the total number of loans accounting for 42 percent of the total value going to Bumiputras (Chee, 1979:48). Yet another scheme to assist small business is the Petty Traders Program, which received an allocation of $50 million in the Fourth Malaysia Plan.

While new schemes were initiated, old ones were strengthened to provide more credit to Bumiputras. MARA, which provided only $15 million in loans in 1971, increased them to $50 million in 1980; MIDF provided $13 million in 1971, but $39 million in 1980. Bank Pembangunan (Development Bank) was started in 1974 to provide medium- and long-term loans to Bumiputras, and in 1980 gave $129 million in loans.

In all, credit assistance to Bumiputras has increased considerably, even though it is still below that of the non-Bumiputras.

Education and Occupation

The Constitutional Amendments of Article 153 in 1971 specifically empowers the Yang di-Pertuan Agong to increase the intake of Bumiputras into tertiary educational institutions. Between 1970-75, four new universities were established, and the intake of Bumiputra students expanded phenomenally. In 1970, there were only 3,237 (40 percent) Bumiputra students in the local universities; by 1975, the number reached 8,153 (57 percent), and in 1980, it was 13,857 (67 percent), far exceeding their population percentage in the country (Malaysia, 1976:401; 1981:352). By the mid-1970s, the problem was not simply one of increasing the number of Bumiputra students in universities; the concern was the field of education. To create a viable Malay industrial and commercial community, they needed training in science, technology, and business. But in 1970, only 384, or 12 percent, of the Malay students were enrolled in science departments, compared with 2,430 (49 percent) non-Malay students in such departments. The situation improved by 1975; 2,342 (29 percent) Malay students were now enrolled in science courses, compared with 4,004 (65 percent) non-Malays (1976:403).

Closely related to education is the change in occupational structure for Malays and the desire to create a professional and middle-class Malay. In 1957, only 3 percent Malays were in the professional-technical and administrative-managerial occupational categories; this increased to 4.8 percent in 1970 and to 6.1 percent by 1980 (see table 1). In the clerical and sales categories, the respective percentages were 4.4 percent, 8.1 percent, and 12.2 percent. In all these categories, the percentages more than doubled. In contrast, even though the non-Malay percentages are still higher, their growth has slackened considerably. The percentages of Chinese in the first two occupational categories were 5.2 percent (1957), 7.0 percent (1970), and 7.5 percent (1980). For the clerical and sales occupations, the percentages were 19.3 percent, 21.6 percent, and 26.3 percent.

Overall Impact of Malay Special Rights Program

The Malay Special Rights Program tends to present issues in purely ethnic terms. Ethnic communities, such as Malays, Chinese, and Indians, are regarded as homogenous groups that become the major actors and units of analysis in society. Frequently, such a view is encouraged by social scientists, who argue that ethnicity, religion, or certain cultural values are more salient in accounting for group identity and action in "developing" or "traditional" societies. While the saliency of ethnic consciousness cannot be ignored, it also cannot be taken as a given state of affairs. Ethnic communities in Malaysia have never been homogenous, often rent by economic, regional, and other divisions. Objectively, there is more inequality within each community than between communities (Anand, 1973). Furthermore, the degree of ethnic consciousness varies between periods. Thus, social science, instead of assuming ethnicity as a constant, should seek to explain its variations. It is therefore more fruitful to examine how the program has affected not only Malays and non-Malays as a whole, but also the different classes within each community.

Economic Growth

We shall begin with the impact on the non-Malay communities as a whole. The economic growth of non-Malays, measured in terms of ownership, occupation, and income, has not stopped, although it has slowed down compared with that of the Malays. In terms of the overall share ownership of the corporate sector, the rate of growth for the non-Malays between 1971-80 was 18.8 percent compared with that of Malays, which was 31.4 percent; non-Malays' share of corporate ownership increased from 34 percent to 40.1 percent, while the Malays' share increased from 4.3 percent to 12.4 percent during the same period (see table 5). In terms

Table 5

Ownership and Control of the Corporate Sector, by Ethnicity 1971-1980

	1971	%	1980	%	Annual Growth Rate 1972-80 (%)
Malaysian residents	2,512.8	38.3	13,817.8	52.5	20.9
Bumiputras	279.6	4.3	3,273.7	12.4	31.4
Other Malaysians	2,233.2	34.0	10,544.1	40.1	18.8
Foreign residents	4,051.3	61.7	12,505.2	47.5	13.3
Total	6,564.1	100.0	26,323.0	100.0	16.7

Source: Fourth Malaysia Plan, 1981-85, p. 62.

Table 6

Number of Contractors Registered with the Ministry of Work and Utilities, 1970, 1981

	1970		1981	
Class	Bumiputra	Non-Bumiputra	Bumiputra	Non-Bumiputra
A-C	37	339	343	1,035
D-F	1,874	3,138	5,673	2,494
Total	1,911	3,477	6,016	3,529

Sources: Adapted from (a) Adam Ismail (1974/75): Tables 1-8; (b) Star, September 4, 1981.

Table 7
Size Distribution of Household Income by Ethnic Group, Peninsular Malaysia, 1957-76

	MALAY HOUSEHOLDS					CHINESE HOUSEHOLDS					INDIAN HOUSEHOLDS					ALL HOUSEHOLDS				
Income Share:	1957/8	1967/8	1970	1973	1976	1957/8	1967/8	1970	1973	1976	1957/8	1967/8	1970	1973	1976	1957/8	1967/8	1970	1973	1976
Top 5%	18.1	22.2	23.8	22.7	n.a.	19.2	19.9	25.4	18.8	n.a.	19.4	22.3	28.4	25.6	n.a.	22.1	23.6	28.1	26.4	n.a.
Top 20%	42.5	48.2	51.3	50.8	n.a.	46.0	46.7	52.3	48.6	n.a.	43.6	48.1	53.6	51.3	n.a.	48.6	51.3	55.9	53.7	61.9
Middle 40%	37.9	34.8	35.7	35.5	n.a.	35.9	36.3	33.5	35.5	n.a.	36.6	35.6	31.5	33.7	n.a.	35.5	34.4	32.5	34.0	27.8
Bottom 40%	19.6	17.0	13.0	13.7	n.a.	18.1	17.0	14.2	15.9	n.a.	19.8	16.3	14.9	15.0	n.a.	15.9	14.3	11.6	12.3	10.3
Mean Income	140	63	172	222	529	302	349	381	444	1247	243	260	301	365	519	215	240	264	324	801
Median Income	112	120	122	n.a.	357	223	261	269	n.a.	623	188	191	195	n.a.	232	156	154	167	n.a.	319
Gini Ratio	.34	.40	.46	.45	.47	.38	.39	.46	.42	.58	.37	.40	.47	.44	.49	.412	.442	.502	.50	.567
Theil Index	.21	n.a.	.40	.36	.44	.25	n.a.	.39	.31	.73	.23	n.a.	.39	.35	.50	.295	n.a.	.476	.43	.709

Source: K.S. Jomo and Ishak Shari, 1981: 215-16.

n.a.: not available

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of occupation, again the rate of upward mobility among the Malays is much higher than the non-Malays; however, the non-Malays are still a little ahead of the Malays in the professional-technical and administrative-managerial categories (see table 1). Measured by median household income, Chinese income is still almost twice that of Malays, but Indian income has fallen behind that of the Malays (see table 7).

Moving beyond the aggregate level, we find that the program has differential impact on the different classes in the communities. It has affected the lower echelons most negatively. Taking the acquisition of business licenses in the construction industry as an example, we find that the squeeze is felt most keenly by the small businesses. Table 6 shows that between 1970-81, the number of non-Malay small contractors (categories D-F) fell from 3,138 to 2,494;[17] whereas the number in the big contractors category (A-C) increased threefold, from 339 to 1,035. On the other hand, the number of Malay small contractors rose from 1,874 to 5,673 in the same period. As a result, Malays account for 70 percent of the small contractors while non-Malays for 75 percent of the big contractors.[18] Competition between the Malays and non-Malays tends to be sharpest in the small business sector where opportunities for joint venture and cooperation are limited, given the market and capital constraints that small businesses face. Consequently, the probability of ethnic tension, arising out of competition, among small businessmen would tend to be higher.

On the other hand, there is evidence to show that the relations between the non-Malay and Malay big businessmen are more collaborative. It is found that practically all the successful Malay big businessmen have joint ventures with either local or foreign non-Malay partnerships.[19] We need to illustrate with only two such cases: (1) Harun bin Dato Musa Ibrahim, one-time acting high commissioner of Malaysia to Singapore, left the civil service to start his own company and now a successful businessman is of the opinion that he has "more in common with Ah Kow the businessman than with Ahmad the fisherman"[20] (Malaysian Business, March 1977:63). (2) Tengku Ariff Bendahara, a younger brother of the present Yang di-Pertuan Agong, heads a conglomerate of more than a dozen companies. His first involvement in the construction business came in 1972 with the establishment of Tab-Faiyin Corporation, a joint venture with Fai Yin Engineer Work, a Chinese firm (Economic Bulletin, March 1976). The relation between the Malay and non-Malay big businessmen is symbiotic; just as the prominent Malay politician or civil servant with influence is sought after as a director, so the non-Malay businessman who has capital and entrepreneurial know-how is courted as a partner by the Malay who wants to establish a big business. As a result, despite a certain degree of discomfort that the non-Malay big businessmen feel about the New Economic Policy, many of the more prominent ones have, in fact, benefited from it, particularly through the vehicle of joint ventures. The percentage of joint-venture establishments increased from 9 percent to 28 percent in the industrial sector between 1970-75 (Malaysia, 1981:64).

Education

Another area where non-Malays are adversely affected and have reacted strongly is in education. Educational opportunities for non-Malays, particularly at the tertiary level, have shrunk enormously; in 1970, non-Malays formed 60 percent of the total enrollment in local universities; in 1980, the percentage dropped to 27 percent, while that of the Malays rose from 40 percent to 73 percent (Malaysia, 1981:352). Besides the drastic decline in higher-educational opportunities for non-Malays, the gradual introduction of Malay as the medium of instruction to all government-aided schools has alienated further the non-Malays. All English-medium schools have been converted into Malay-medium schools; and while Chinese and Tamil schools are still allowed at the primary and secondary level, they are discouraged. At the tertiary level, the government in 1981 turned down a request by the Chinese to establish a private university with Mandarin as the medium of instruction. The issues of language and education have become a fertile ground for breeding Chinese chauvinism, in large part a result of the government's policies. If the limitations placed on non-Malays to acquire an education in their own language were compensated for by an increase in educational and employment opportunities for them, the level of discatisfaction experienced by the non-Malays would be reduced substantially. However, the government has done the opposite. Non-Malays who have accepted Malay as the national language and attended Malay-medium schools still find themselves discriminated against in terms of job and higher-educational opportunities. Under such circumstances, people can be expected to react by clinging to the one last asset they have, i.e., their cultural heritage. The keen sense of cultural deprivation that non-Malays feel today cannot be understood apart from the economic deprivation that they face.

Inequality

The whole strategy of the government, particularly as embodied in the Malay Special Rights Program, has been to redress ethnic inequality rather than inequality per se; this despite the studies that show that the former accounts for only 10 to 20 percent of total inequality in society (Anand, 1973; Kusnic and Da Vanzo, 1980). In essence, the program reproduces the class structure presently found in the non-Malay communities on to the Malay society. It is therefore hardly surprising that the government's development efforts have worsened income distribution not only for the whole society but also within each community and particularly among the Malays. Table 7 shows the distribution of household income between 1957 and 1976.[21] Despite the slight fluctuations, the trend is unmistakably one of secular increase. Inequality among the Malay households was increasing most rapidly from 1957 to 1973 and then slowed down slightly in 1976. In 1973, the top 20 percent of Malay households took 50.8 percent of the total Malay income, compared with 48.6 percent and 51.3 percent for the Chinese and Indians respectively. We have discussed how the middle- and upper-class Malays have been in the best position to take advantage of the program and how it has resulted in increased ethnic tensions between the lower sections of the population who have to compete harder for the same resources.

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Inequality within the Malay community has produced ruptures among themselves, a trend much feared by the ruling Malay party (UMNO), which has with increasing frequency appealed to the Malays to remain united. This conflict is manifested in several ways, some more direct than others. For example, organizations like the state Malay Chambers of Commerce that represent primarily the interests of small Malay businessmen have criticized government policies that favor big businesses. In a more indirect way, the disenchantment of some Malays is expressed through fundamentalist religious movements that are gaining popularity among the urban and middle-class Malays. While considerable research is still required to understand the exact nature of these movements in Malaysia, it is instructive to note parallel developments in Iran and Indonesia, where such movements often spearhead the interests of the petty bourgeoisie (Fischer, 1982; Robison, 1978).

Social Harmony

Finally, we shall consider the impact of the Malay Special Rights Program on social harmony. It is an avowed aim of the program to restructure society so as to achieve national unity. What has been the actual effect?

Before answering this question, two related issues should be considered. First, an affirmative action program is but one aspect of the larger problem of changing the existing unequal distribution of resources between groups in a society. When resources are unequally distributed between social groups according to purely economic criteria, we refer to the resultant system as class structure or class stratification. Here, horizontal layers, i.e., social classes, whose boundaries are permeable depending on the degree of social mobility, are vertically or hierarchically arranged. This may be termed the vertical dimension of differentiation. On the other hand, when resources are unequally distributed according to noneconomic criteria such as ethnicity or sex, we get ethnic or sexual stratification. Ethnic and sexual divisions in society are basically horizontal differentiation.

However, when certain ethnic or sexual groups are not only differentiated and segmented but also hierarchically slotted into the stratification system of society, then they also assume a vertical dimension. That is, they are both segmented and hierarchical (Hechter, 1978); ethnic and class membership tend to overlap. Affirmative action programs in general only aim at removing the segmentation aspect, i.e., dispersing the ethnic groups into various classes, without eliminating the hierarchical dimension: inequality as a whole.

The second related issue is whether it is possible to avoid conflict and dissent when the existing unequal distribution of resources in a society is either maintained or changed--a dilemma faced by Malaysia for which there is no easy solution. It is unlikely that there can be social harmony if the problem of ethnic inequality in Malaysia were not redressed. It is also unlikely that those that are negatively affected by any change in the redistribution process will not create conditions of conflict. The question, therefore, is not how can we avoid social costs, but how can we minimize them and who is to bear them? Thus far, redistribution has stopped at the point of ethnic redistribution without touching the problem of inequality as a whole.

In this strategy, the groups that bear the social costs are the lower classes of all communities, particularly the non-Malays, while the fruits are enjoyed by the upper classes of all communities, particularly the Malays. Furthermore, such a strategy does not minimize social conflict, it only exacerbates ethnic tensions among those who bear the costs, thus making the goal of national unity more elusive. The alternative strategy of redressing both ethnic and class stratification at the same time has not been adopted not because it is socially unfeasible but because it is politically unacceptable to those in power.

Conclusions

Malaysia's affirmative action program, legally constituted as Malay Special Rights, stands as one of those rare cases of success, if success is measured purely in terms of the extent to which it has brought about an improvement in the economic position of Bumiputras.[22] Advances made by Bumiputras in the fields of education, employment, occupational mobility, ownership of small businesses, as well as large corporations, have been impressive and, in some cases, have even surpassed that of the non-Malays. This success can be attributed to the political hegemony that the Malays enjoy and are able to use to promote the Malay Special Rights Program.

The same success, however, cannot be claimed for the objective of creating a harmonious and unified society. On the contrary, Malay Special Rights has remained the most contentious issue, threatening constantly to tear the fabric of society apart. The racial riots of 1969 were fundamentally related to it; the Malays were unhappy because it was not producing enough results, the non-Malays, because it had gone too far. Following the riots, the Malays, because of their political hegemony, managed to give the program a further boost, thereby alienating the non-Malays even more.

It does not appear that the affirmative action program, as is presently conceived in purely ethnic terms, could contribute to social unity because the conventional idea of a minority that is discriminated against politically, economically, and socially does not apply to Malaysia. While Malays are economically disadvantaged, they are politically superior, and the opposite is true for the non-Malays. Therefore, who constitutes a minority and should receive special assistance is ambiguous. But if the primary purpose of any affirmative action program is social and economic justice and redistribution in favor of the discriminated, as it should be, then the primary consideration for receiving assistance should be based on need, a universalistic criterion, rather than ethnicity, a particularistic trait. Unless the government is willing to use this yardstick, its economic boon will also prove to be its social bane.

NOTES

1. In this paper, the terms "Bumiputra" and "Malay" will be used interchangeably for two reasons: (a) the concept of Special Rights was meant originally for the Malays; other native groups were only added later, and the term "Bumiputra" was coined to include them; (b) Malays still form the majority of Bumiputras, and the program benefits them most.

2. Even though the legitimate rights of other communities are mentioned, no guidelines are specified so that the phrase does not carry with it any substantive content.

3. A slight concession was made by allowing the implementation of Article 153 to be questioned.

4. Means (1972) has a good discussion on the history of Special Rights, and I have availed myself of some of his ideas.

5. It has been argued that colonial rule strengthened the position of the sultans in the following ways: (a) it assured them of a stable and increased income; (b) their claim to superior proprietary ownership of all lands was given legal status; (c) their power vis-a-vis the local chiefs was enhanced.

6. For a detailed discussion of the Malay Reservation Enactment, see T. G. Lim, 1977:106 and D. Wong, 1977:chap. 13.

7. This, however, did not mean Malays benefited most from colonial educational policies. On the contrary, non-Malays were best able to take advantage of the English education offered as they were located principally in towns. In 1901, of the total number of boys enrolled in English schools in the Straits Settlement, only 5.2 percent were Malays, 59 percent Chinese, and 21 percent Indians (Loh, 1975:51).

8. It needs to be emphasized that the bulk of the economy was not owned by non-Malays but by foreigners.

9. The Alliance Party won the first federal elections in 1955 and became the ruling party. It is an intercommunal party, made up of three communally organized parties--UMNO (United Malay National Organization), MCA (Malayan Chinese Association), and MIC (Malayan Indian Congress).

10. The Malayan Civil Service is considered the most prestigious and powerful section of the public service. Its high-level officers participate in top-level policy-making processes (Tilman, 1964: chap. 5).

11. MARA is just one of the numerous government agencies providing scholarships. Every state government, as well as numerous federal government agencies, has its own scholarship schemes.

12. The terms "Ali-Baba" and "Ali-John" refer to a partnership in which one party, Ali, representing the Malay, is a sleeping partner who allows the non-Malay partner to run and control the business.

13. This problem also has its historical roots where the Malay aristocracy's involvement in business took the form of leasing mining or planting rights to Chinese businessmen for a tribute.

14. See the studies of Popenoe (1970); Charlesworth (1974); Abdul Aziz (1977); Abdul Ghani (1980); and the various reports of the Bumiputra Economic Congresses.

15. While Malay businesses receive loans from Malaysian Industrial Finance Ltd. (MIDF), its major emphasis is to grant industrial loans without regard to ethnicity (at least before 1969).

16. See the Malaysian government publication, Towards National Harmony, Kuala Lumpur, 1971.

17. This negative growth is because non-Malays could not receive contracts for projects under category F. Hence there were no category F non-Malay contractors. The increase in the number of non-Malay contractors in categories D-EX is marginal.

18. We do not know what percentage of the non-Malay contractors are foreign contractors. However, the rather significant increase in the percentage of foreign capital in construction industry from 5.9 percent to 28.6 percent may indicate that it is substantial (Malaysia, 1981:64).

19. See the profiles of Malay businessmen in Malaysian Business, January 1; August 1978; March 1977; and Economic Bulletin, March 1976.

20. "Ah Kow" and "Ahmad" are common Chinese and Malay names respectively.

21. It has been pointed out that while the data for the different years are not strictly comparable, given the different samples and methods used in the studies, they can be used to identify the secular trend (Snodgrass, 1980).

22. Even this economic "success" has to be qualified because of the increasing inequality that has occurred within the Bumiputra community.

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AFFIRMATIVE ACTION: THE SCHEDULED CASTES AND THE SCHEDULED TRIBES

B. Sivaramayya

A distinctive feature of the Constitution of India is its provisions providing for "reservations" ("quotas" in the American parlance) in favor of two disadvantaged groups, namely, the scheduled castes and the scheduled tribes. These reservations exist: (1) in the state legislatures and the union legislature or Parliament, (2) in services under the states, and (3) in educational institutions. In addition, some states have reservations in services under the state and in educational institutions in favor of other backward classes. Reservations coupled with other welfare programs constitute the core of affirmative action for the uplift of these groups. The aspects relating to affirmative policies and programs in favor of the scheduled castes and scheduled tribes will be considered in this paper.

Background

As pointed out by Beteille, the scheduled castes and the scheduled tribes share the common disabling feature, that is, "exteriority."[1] But the nature of exteriority from which they suffer differs in its origin and practice. The scheduled castes suffered from segregation and the scheduled tribes from isolation. The need for protective discrimination or affirmative action in the case of the former arose because they were the victims of the practice of untouchability and other forms of social injustices. "Untouchability" is traced to a verse of Manu[2] that says: "But the dwellings of Chandalas and Svapakas shall be outside the village, they must be made Apapatras, their wealth [shall be] dogs and donkeys."[3] Apapatras in this verse means that the vessels used by them should be destroyed.

Many causes gave rise to "untouchability."[4] Of these two deserve special mention. Persons engaged in unclean occupations like scavenging,

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flaying of animals, and tanning became untouchables; and the offspring of a prohibited marriage--a Brahmin woman and a Shudra man, for example --were expressly stated to be untouchables.[5]

The later social practices served only to increase the social disabilities of untouchables. Even though Manu did not say that the shadow of an untouchable was polluting, it was so considered in later times, at least in some regions. The untouchables could not draw water from the wells and tanks used by the caste Hindus. They were denied the use of public roads and transport; their women could not dress in the manner other Hindu women did, nor could they wear jewelry. Over centuries, they were confined to occupations that were low paid and considered unclean. The agrestic slavery that prevailed in some regions was largely confined to the untouchables and tribals, which served to aggravate their disabilities. Their share in agricultural land, which is the key to Indian economy, was negligible.

The scheduled tribes can be classified broadly under three main groups. First, the tribes living in the north and northeastern zones in the valleys and in the eastern frontiers of India. Second, tribes inhabiting the central belt of hills and plateaus along the dividing line between peninsular India and the Indo-Gangetic Plain, and, third, tribes dispersed over the extreme corners of southwestern India in the hills and covering portions of the Ghats. According to anthropologists, these tribes fall into three distinct racial types. The tribes belonging to the first category belong to the Mongoloid type, the second to Australoid, and the third to Negroid racial groups. They constitute about 7 percent of the population of India and speak 106 mother tongues. The tribals who were living in inaccessible regions were cut off from the main currents of development and were exploited by the more advanced people of the plains.

Constitution and Affirmative Action

The Indian Constitution is conspicuous in that the duty of the state to uplift the weaker sections of society, like the scheduled castes and the scheduled tribes, has been built into the provisions of the Constitution, instead of leaving it to the administrative policies and their approval by the judiciary. The general spirit behind the concern of the Constitution for weaker sections is reflected in the directive principle of the state policy laid down in Article 46, which states: "The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."[6] Services under the state became the focus of attention for historical and economic reasons. In the south, in the province of Madras and in the native state of Mysore, the governments fixed quotas for services under the government on the basis of populations of castes. The policy was referred to as the communal G.O. (government order). The avowed object of the policy was to break the dominance of the Brahmin community in the services. Therefore, there was a natural inclination to adopt that caste-based precedent in the case of scheduled castes and scheduled tribes. The undeveloped nature of the country's economy at the time of independence and the dominant role of the state enterprise,[7] subsequently, made reservations almost the sole option before the founding fathers of the Constitution and the policy-makers who came after.

Article 15 of the Constitution, which prohibits discrimination, says: "The State shall not discriminate any citizen on grounds only of religion, race, caste, sex, place of birth or any of them."[8] The word "only" in the article is significant, for it is open to the state to discriminate on grounds like poverty. To remove the barriers of constitutional challenge to protective discrimination in favor of disadvantaged groups, Clause 4 of the article provides: "Nothing in this article or in cl. 2 of Article 29 shall prevent the State from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes."[9]

Article 16 guarantees equality of opportunity in services under the state.[10] To facilitate the implementation of policies relating to reservations, Clause 4 of that article provides: "Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."[11]

The specific enactment of provisions relating to reservations under the Constitution has one positive aspect. The policy itself has been rendered immune from an attack on its constitutionality on the grounds of offending equality before the law. The reservations have been held to be "reasonable classification."[12] The attacks are directed not on the principle but on the modalities pertaining to its execution. The position may be contrasted with that in the United States in which the Supreme Court observed: "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."[13]

The concern of the Constitution for the uplift of the scheduled castes and the scheduled tribes once again finds expression in Article 335, which states that "the claims of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration in the making of appointments to the services and posts in connection with the Union or of a State."[14]

Reservations in Legislatures

Under the constitutional scheme, only members belonging to the scheduled castes or the scheduled tribes can contest for the reserved seats, but they are chosen by the general electorate. Thus a candidate contesting for a reserved seat must, apart from fulfilling the qualifications required of a general candidate, belong to specified castes or tribes.

Formerly, the constituencies were double-member constituencies. A voter was given two ballots. In the counting of votes, no distinction was drawn between the general and the reserved seat. The only limitation was that of the two members declared elected, one should belong to the specified caste or tribe. In other words, a reserved candidate, even though he secured fewer votes than an unsuccessful candidate contesting for the general seat, would be deemed to have been elected. But if both the reserved candidates secure higher numbers of votes than the general candidate, they would be deemed to have been elected. In V. V. Giri v. D. S. Dora,[15] two candidates who filed their nominations for the reserved tribal seat only secured more votes than the candidate standing for the general seat. They were declared to have been elected, one for the general and the other for the reserved. The Supreme Court, interpreting the relevant section of the Representation of the People Act (1951), upheld the decision. To overcome such cases, the double member constituencies have been abolished and replaced by single member constituencies.

As to the number of seats reserved in the case of scheduled castes or the scheduled tribes in the House of People (Lok Sabha), Article 330 says that it "shall bear, as nearly as may be, the same proportion to the total number of seats allotted to that state in the House of People as the population of the Scheduled Castes or of the Tribes as the case may be (in respect of which seats are so reserved) bears to the total population State."[16] However, in states or union territories where they constitute a majority, the scheduled tribes are not entitled to any reservations in the legislature.

Originally, the reservations in legislatures were to expire after 20 years. But they have been extended to a period of 40 years by amendments in 1969 and 1980.

Problems of Group Membership

The benefits of affirmative action have been conferred on groups. Article 341 empowers the president to specify by a public notification "the castes, races or tribes or parts of groups within castes, races or tribes" as the scheduled castes for purposes of the Constitution.[17] The notification with respect to a state should be made after consulting the governor of the state. Article 342 provides for a similar notification with respect to the scheduled tribes.[18] Pursuant to these powers, the Constitution (Scheduled Castes) Order, 1950, and the Constitution

(Scheduled Tribes) Order, 1950, have been passed. Of these the former deserves attention.

The Constitution (Scheduled Castes) Order, 1950, now gives a list of 1,041 castes in its schedule.[19] The first point that deserves attention is that only "Hindu" and Sikh scheduled castes can claim the benefits of reservation. On this, Paragraph 3 of the order states that "no person who professes a religion different from the Hindu or the Sikh religion shall be deemed to be a member of the Scheduled Caste." The Supreme Court held that the order of the president is conclusive.[20]

An enigma underlying the above provision needs notice. The Sikh religion, like Christianity, does not believe in the caste system. But in spite of this, among the Christians of the south and among the Sikhs, the Hindu social practices relating to caste have permeated. Thus, caste distinctions are observed by the followers of these religions to a considerable extent, even though it is opposed to their respective theologies. But only Sikh scheduled castes, apart from the Hindu scheduled castes, are entitled to the benefits of reservation. This anomalous exception has its basis on the demands made by the leaders of the Sikh community at the time of the framing of the Constitution and concessions made at that time.[21] Alexander notes that Pulayas (the scheduled caste converts to Christianity in Kerala) have come back to the Hindu fold to avail themselves of the benefits of reservations.[22]

Buddhism does not recognize the caste system. Dr. Ambedkar in his later years became a Buddhist and urged his followers to become Buddhists. At his behest, many renounced Hinduism and adopted Buddhism. The question arose as to whether a person converted to Buddhism ceases to be entitled to the benefits of reservation. It should be noted that the term "Hindu" in its wider sense includes not only persons who are Hindus by birth, but also those belonging to its reformist offshoots like the Buddhists, Jainas, Sikhs, Arya Samajists, etc. It is in this wider sense that all legislations dealing with topics like marriage, divorce, adoption, succession, apply the term. In Punjab Rao v. Meshram, Meshram, who was a member of a scheduled caste, declared in public that he embraced

Buddhism.[23] He later contested a reserved seat and won. His opponent challenged his election on the ground that Hindu scheduled castes alone are entitled to contest for reserved constituencies; and that Meshram, having become a Buddhist, ceased to be a scheduled caste. The Supreme Court accepted the plea and held the election void. It also held that the term "Hindu" in Paragraph 3 of the order had been used in a narrow sense; and that it was immaterial in itself that this conversion was not in strict compliance with the formalities.

Mr. Raj Bhog undertook a fast to make the government change the rule. But the then union home minister, Shri Charan Singh, was opposed to the extension of benefits of reservations to the neo-Buddhists on the ground that some neo-Buddhists will be entitled to the benefits, while others would not. This he pointed out would mean the introduction of a caste system among the neo-Buddhists.[24]

The existing reservations in favor of ethnic groups have given rise to other problems relating to membership of the group even in the absence of renunciation of the faith. Formerly, the rule that the bride and the bridegroom should belong to the same caste was adhered to, and violations of it were rare. Tribal groups also observed the traditional rules relating to prohibitions in marriage. In the case of caste groups in particular, the changes in the law of marriage in 1946 and subsequently in 1955 removed the preexisting bars relating to caste.[25] The growing interactions of tribals with nontribals have given rise to mixed marriages. Similarly, under the traditional law for a valid adoption, the caste of the person who was adopting and the boy who was being adopted should be the same. (The traditional law recognized the adoption of boys only and not of girls.) But considerations of caste in adoption have been rendered wholly irrelevant under the Hindu Adoptions and Maintenance Act of 1956. The question that has arisen before the courts is this: When a member belonging to a scheduled caste marries a woman who is not a member of the scheduled castes, or when a member of a scheduled tribe marries a woman who does not belong to the scheduled tribes, is the woman entitled to the privileges of reservation? We are here primarily concerned with the position of the wife because her social status in India as yet follows that of the husband. Similarly, a question has arisen when a person who is a member of a scheduled caste adopts a boy or girl who is not a member of a scheduled caste. Is the adoptee entitled to the benefits of reservation? These questions need to be considered not only with reference to the short-term objectives of distribution of benefits of reservation and the prevention of their misuse, but also in the light of long-term goals of promotion of fraternity, which find explicit mention in the preamble to the Constitution.

In Urmila Ginda v. State, Urmila, a lady belonging to a high caste, married Fl. Lt. Ginda, a member of a scheduled caste.[26] She applied for a post and she was placed second on the list of selected candidates. But she did not get the job. On making inquiries, she was told that the post was reserved, and that she, being a member of a higher caste herself, could not be given the post merely on the ground of her marriage with a scheduled caste person. A single judge of the High Court who heard the writ petition was of the view that she was not entitled to any relief. The judgment gives two reasons as to why a person belonging to a higher caste could not be considered for a post reserved for the scheduled castes. First, there is the possibility of the abuse of the provision that enables a person of a higher caste to be considered as a scheduled caste. Second, it enables a person who is not subject to the same kind of social and educational backwardness to compete for the post. But viewed from the point of social change, such marriages deserve encouragement. A report of the Commission for Scheduled Castes and the Scheduled Tribes, submitted in 1979, recommended that where one of the spouses is a member of a scheduled caste and the other is not, some concessions in recruitment to services may be given to the nonscheduled caste spouse.[27]

In Khazan Singh v. State, Khazan Singh, who was a Jat, a nonscheduled caste, was adopted by Kishan Lal, a member of a scheduled caste.[28] He secured a scheduled caste certificate on the basis of the adoption and obtained a job as a subinspector of police. Subsequently, his appointment was canceled on the ground that he was not a member of a scheduled caste by birth. The learned judge in the main relied on the language of Section 12 of the Hindu Adoptions and Maintenance Act, 1956, which says that an adopted child shall be treated as a child of the adoptive father or mother "for all purposes." Therefore, full effect was given to the statutory provision. Referring to the possibility of abuse, he stated:

> The worst that could be said is that borrowing a leaf from the "tax-planner's" note-book in regard to the permissible, if not exactly laudable, practice of taking advantage of loop hole in the law, the petitioner has done a bit of "career-planning." Since it is lawful, if it has the legal effect for which he contends it has to be given effect to and it is not permissible to refuse to give the legal effect because the course was adopted by the petitioner to obtain the post in Government service.[29]

Ranganathan, J., further added:

> There could be adoptions in the other directions as well and also adoptions with the more laudable object of promoting social harmony . . . . In the long run it may be found that the principle contended for by the petitioner in the present case may not be really opposed to the object and scheme of the Constitution in regard to reservation for Scheduled Castes and Scheduled Tribes. On the other hand if genuine adoptions, both ways, become frequent they may eventually lead to the development of that social equality at which the Constitution aims.[30]

On the other hand, the Elayaperumal Committee (as popularly called) voiced its concern at fake adoptions as a device to evade the policy behind reservations. It noted that out of 28 seats reserved for the scheduled castes in 1968-69 in Rajasthan, 16 were taken by those who had secured scheduled caste certificates on the basis of adoptions.[31] The committee noted further that according to reports received by it, the practice is prevalent in the states of Uttar Pradesh and the Punjab. It recommended that scheduled caste certificates should not be issued to nonscheduled castes on adoption.

Conceptual Basis of Reservations

What has been noted before leads to the question as to the conceptual basis behind reservations. A judge of the Supreme Court of India referred to reservations as a "conceptual disaster area."[32]

Nickel, in the context of the Defunis case, referred to three "principles" in justification of affirmative action programs,[33] namely, the compensatory principle, the distributive justice principle, and the utility or welfare principle. In the Indian context, the following principles should be noted: (1) compensatory principle--that is, compensation for past injustices; (2) protective principle--protection of the weaker sections of the community as envisaged in Article 46 of the Constitution; (3) proportional equality; and (4) social justice, under which concepts of distributive justice and utility are included to a large measure, if not wholly.

Gross raised forceful objections to the principle of compensation as a justification for reverse discrimination or affirmative programs.[34] The basic questions are as Guzzardi put it: "On which sons should the sins of the fathers be visited? And for how many generations?"[35] The compensation is not to the actual victims, nor is it given against the actual perpetuators of the social injustices. These are valid arguments in the Indian context, also. The compensation principle can have validity, if at all, in the case of scheduled castes only, but not in the cases of other groups like the scheduled tribes or other backward classes. But the fact that ex-untouchables who became converts to Christianity or Buddhism or some other religion are not entitled to avail of the benefits of affirmative action shows that the policy is not based on compensation. Further, the cost or burden of reservations falls upon Muslims and Christians who were in no way responsible to the historical injustice committed against the scheduled castes. As Beteille points out: "Protective discrimination can and should seek to satisfy present needs; it can do nothing to repair past injuries."[36]

The protective principle merits attention in view of the broad directive of Article 46, which states that "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation." Also, the words "protective discrimination" have gained currency in academic writings to denote affirmative programs. If the protective principle is understood in its wider sense as protection from all forms of social injustices, then it falls appropriately within the principle of social justice. But if we view the principle in a narrow sense as involving the situations of exploiters and exploited or even privileged and nonprivileged in Indian society, then reservations cannot be viewed as involving "protection" of some groups. For, in reservations, whether they pertain to jobs or seats in educational institutions, we come across individuals competing for positions, which is different from situations involving exploiters and exploited. It ought not be overlooked that there are some in the nonpreferred groups who have disadvantages similar to those in the preferred groups. Further, even those who are economically better off among the scheduled castes and the scheduled tribes are entitled to avail themselves of the benefits by virtue of their membership in the group. Thus, the protective principle cannot be considered as the basis of reservations.

Mathew, J., in his opinion in State of Kerala v. N. M. Thomas,[37] relied upon the principle of proportional equality as the basis for reservations. He referred to the decisions in Griffin v. State of Illinois[38] and Douglas v. State of California.[39] He also noted the statement of Justice Harlan in Griffin's case that "the real issue . . . is not whether Illinois has discriminated but whether it has a duty to discriminate." Mathew, J., stated:

> There is no reason why this Court should not also require the state to adopt a standard of proportional equality which takes account of the differing conditions and circumstances of a class of citizens whenever those conditions and circumstances stand in the way of their equal access to the enjoyment of basic rights or claims.[40]

But the view is open to question. If proportional equality is the underlying principle, then there is no reason why the benefits of reservations are restricted to the Hindu and Sikh scheduled castes only; why they are denied on conversion to faiths like Christianity and Buddhism and why the poor among the forward groups are not entitled to them.

Mathew, J., in his opinion stated that the test of equality of opportunity is equality of result. More forcefully, some claim that the

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Constitution envisages it, and they justify reservations on that ground. As regards this view, apart from what has been noted before, it can be said that: (1) equality of result does not find an express mention in the Constitution, and (2) even if it can be implied, there is no reason why it should be confined to jobs only, and not to land, the most important resource in India, which provides livelihood for 70 percent of the population.[41]

The last conceptual basis of reservations that deserves notice is social justice. Although the term "social justice" has evoked caustic comments,[42] it finds a place in the preamble to the Constitution of India and in Article 38. In this context, a few points need mention. The term "social justice" is compendiously used to denote socioeconomic justice. The words "distributive justice" do not occur in the Constitution. Therefore, the concepts of distributive justice are covered in the rubric of social justice.

Are groups or individuals the target of affirmative action proposals? The general impression is that the reservations existed in favor of groups. But a different note has been struck by Choudhari, J., of the Andhra Pradesh High Court. After recalling the statement of Arthur Koestler that classes are unreal and individuals are real, he added:

> There are two other reasons which prompt me to think that Article 15(4) in the ultimate analysis thinks of individuals only. Of them one is that Article 15(4) forms an exception to the individual fundamental right guaranteed to the citizens as an individual under Articles 15 and 29. The exception could only deal with the same subject matter of the main enacting clause. The other is that the quality of backwardness can attach itself only to an individual and therefore the subject of backwardness can only be an individual.[43]

It should be mentioned that the concern of the learned judge is that the scarce resources of the poor nation should not be used for the discriminatory benefit of individuals who are already well advanced on the ground that they belong to a particular group.

The principle of social justice as the basis of reservations is capable of accommodating either of the views. It can to a greater degree rationalize the existing position that the Hindu and Sikh scheduled castes alone are entitled to benefits of reservations as backward classes. For alone are entitled to benefits of reservations as backward classes. For in the case of Hindus, only the combination of social and economic disabilities existed in their worst form on the basis of religion and tradition.

Qualitative and Quantitative Aspects of Reservations

In view of the specific mention in the provisions of the Constitution, the inherent validity of reservations qua reservations was never in issue. On the other hand, the issues centered around two questions: (1) whether reservations should be confined to initial appointments only or they should be extended to promotions also; and (2) what should be the quantum or extent of reservation?

The first question was considered by the Supreme Court of India in General Manager, Southern Railway v. Rangachari.[44] There a railway employee challenged the directive of the general manager ordering the reservation of selection posts in Class III railway service for the benefit of the scheduled caste and the scheduled tribe employees. The Supreme Court of India by a majority of three to two upheld the directive. Delivering the majority opinion, Gajendragadkar, J., stated:

> The condition precedent for the exercise of the powers conferred by Article 16(4) is that the State ought to be satisfied that any backward class of citizens is not adequately represented in its services. The condition precedent may refer either to the numerical inadaquecy of representation in the services or even to the qualitative inadequacy of representation. The advancement of the socially and educationally backward classes require not only that they should have representation in the lowest rung services but that they should aspire to secure representation in selection posts in the services as well.[45]

Reservations in promotions have given rise to much criticism and dissatisfaction. Firstly, it has been stated that reservations in promotions on the criterion of backwardness will demoralize the efficient and hardworking members in the services and is inimical to efficiency in services. Secondly, it has been urged that those who are holding a post or a job cannot be considered as belonging to the backward classes and therefore reservation in their favor is unjustified.

A similar question was considered with reference to admissions to the postgraduate courses. In M. Narasimha Rao v. State,[46] reservations in favor of backward classes in postgraduate medical courses were challenged. The reservations were upheld. But Choudary, J., doubting but not dissenting, added:

> Yet, I feel that a reservation in a post-graduate medical course on the ground of educational backwardness may not constitutionally be permissible because a Medical Graduate ex-hypothesi loses his educational backwardness.[47]

As regards quantum of reservation Balaji v. State of Mysore[48] is the leading case on the point. Though the case primarily deals with reservations in favor of "other backward classes" (backward classes other than those belonging to the scheduled castes and scheduled tribes), yet one of the principles laid down in it was followed in reservations for the scheduled castes and the scheduled tribes. There the government of Mysore passed an order providing for reservation up to 68 percent in services and in admissions to professional institutions like medical schools in favor of the scheduled castes, the scheduled tribes, and other backward classes. The petitioner, an applicant to the medical course, challenged the order. The Supreme Court inter alia held that reservation under Article 15(4) is in the nature of an exception and therefore reserved seats should be below 50 percent.

The Supreme Court in Devadasan v. Union of India[49] followed this principle as to the quantum of reservation in posts. There the "carry forward" rule applied by the central government was challenged. Under the rule, if in any year suitable candidates are not available from the scheduled castes and the scheduled tribes to fill the reserved vacancies, the reserved vacancies would be dereserved and filled by open competition. A corresponding number of reserved posts would be carried forward for the next year. Under the rule, the unfilled vacancies of the scheduled castes and the scheduled tribes could be carried forward for two years preceding the recruiting year. By the operation of the rule, it was possible that 54 percent of the vacancies would be filled by the reserved categories as against 46 percent available to the general pool. The court held that the rule stated in Balaji's case is equally applicable in the case of posts. The majority of judges in Devadasan's case were also of the view that Article 16(1) lays down the general rule of equality of opportunity and Article 16(4) (which provides for reservations) is an exception to it; Subba Rao, J., expressed his dissent. In other words, according to him, there is no limit as to the number of seats that may be reserved by the state.

But the opinions in State of Kerala v. N. M. Thomas[50] cast a considerable doubt on the principle laid down in Devadasan's case. There, under the rules framed by the government of Kerala, exemptions for a limited period were granted in favor of the scheduled castes and the scheduled tribes employees from passing the departmental tests for promotion to higher posts. The result was that out of the 51 posts of upper-division clerks, 34 posts were filled by candidates belonging to a scheduled caste or a scheduled tribe who did not pass the test, and 17 were given to those who passed the test. The Supreme Court by a majority of five to two upheld the validity of the rules. Ray, C.J., and Beg, J., upheld the rules on the ground that they conferred exemption from passing the tests for a limited period only. But Krishna Iyer and Fazl Ali, J.J., went further and stated that Article 16(4) is not in the nature of an exception to Article 16(1), thus expressing considerable doubt on the ruling in Devadasan's case. But in A.B.S.K. Sangh (Rly) v. Union of India,[51] the Supreme Court clarified that the "carry forward" rule in the selection of scheduled caste and scheduled tribe candidates should not in any given year be "considerably in excess of 50%." To this proposition the rider was added that "some excess will not affect but that substantial excess will void the selection." The Court held that the "carry forward" rule is valid not only with selection posts but also with promotion posts. They also upheld the circular that a scheduled caste or a scheduled tribe candidate gets one grading higher than otherwise assignable to him, that is, if he is "good," he will be categorized as "very good," and if "very good" as "outstanding."

An Evaluation

Jobs and Positions. What is the impact of the policy of reservations over a period of three decades? No doubt, the share of the scheduled castes and the scheduled tribes in the services has increased. But their share in Class I and Class II services is still much less than their proportion in the population. According to the 1971 census, scheduled castes constitute 15.04 percent of the total population of the country and scheduled tribes 7.5 percent. The following figures,[52] indicating their representation in central government services for the years 1957, 1966, and 1979, chosen at random, will give an indication of the progress achieved in this direction:

Class I Services

Year	% of Scheduled Castes	% of Scheduled Tribes
1957	0.71	0.10
1966	1.77	0.52
1979	4.75	0.94
Class II Services		
1957	2.01	0.32
1966	3.25	0.27
1979	7.37	1.03
Class III Services		
1957	7.03	0.62
1966	8.86	1.10
1979	12.55	3.11
Class IV Services (excluding Sweepers and Scavengers)		
1957	22.10	2.44
1966	17.94	3.41
1979	19.32	5.19

Reservations apart from economic benefits give a measure of self-confidence and esteem to the disadvantaged groups. But dependence on government service alone is not in the interests of these groups. Certain diversification in occupational patterns becomes necessary. The Reports of the Commissioner for Scheduled Castes and Scheduled Tribes stress this aspect.[53] Thus, licenses for running taxis and buses, and for carrying on certain commercial activities, are given to members of these groups.

But reliance on the largess of the state has resulted in certain kinds of distortions and inadequacies. After all reservations are concentrated in "intellectual spots." It is now proposed to consider these aspects briefly.

The general trend to look to reservations in educational institutions and in jobs as the main plank of affirmative action has led to a tendency toward the neglect or lack of emphasis on the problems that affect the poorest of poor in these groups. Two problems come to mind in this context: first is the problem of bonded labor, and the second is the enforcement of the minimum wages in agriculture. The mention of these does not imply the underestimation of other problems, like making provision for drinking-water facilities in villages. To understand these two problems, a brief mention must be made of the nature of agricultural labor in India.

The nature of agrarian labor relationships in India may be broadly classified as free and unfree. In free relationships, the labor has the freedom to stipulate the rate and the time for which he would serve. On the other hand, in unfree relationships, he loses the bargaining capacity. The bonded labor system that exists throughout India--by whatever name called--typifies this. Under the system, a person agrees to serve the master either for low wages or no wages (food and clothing being provided by the master) in consideration of a debt taken from the master. Being too poor, they are often not in a position to discharge the debt and a son inheriting the debt bondage of the father is not uncommon. Besides exploiting the illiteracy and ignorance of the bonded laborers, the masters frequently keep them under bondage even after the debts have been discharged. It has been stated that 66 percent of the bonded labor are from the scheduled castes. According to an estimate, there are 2.2 million bonded labor in India.[54]

Ever since 1920, some states have been enacting legislation to eradicate the practice, but these are marked by ineffective implementation. In 1975, the central government passed an ordinance that was subsequently enacted as legislation making the practice an offense punishable by law. It created a machinery for the identification and release of the bonded labor. The initial years of the legislation were marked by earnestness in implementation, but subsequently, along with changes in the government, enthusiasm waned. One of the major problems in eliminating the system is the inability to develop adequate measures to rehabilitate the bonded laborers.

Many of the scheduled caste members eke out their livelihood as agricultural labor. "There is pronounced landlessness among Scheduled Caste workers (51%) as compared to Scheduled Tribes (33.04%) while only 20.20% of agricultural labourers were reported in the rest of population."[55] The work is of a seasonal character. Although there are statutory minimum wages fixed, they are hardly adhered to in practice. The reasons behind the ineffective implementation are: (1) large availability of surplus labor, (2) unorganized nature of agrarian labor, and (3) ineffective and insufficient staff in the field.[56] Similarly, not much has been achieved in diverting the members of these groups from unclean occupations to clean occupations, that is to say, to convert dry latrines into water-borne latrines. On this, the 26th Report says:

> It [in the commissioner's 1966-67 Report] was further recommended that even amongst Scheduled Castes and Scheduled Tribes, there were poorer and still poorer sections, neglected and even more neglected sections and the same kind of programmes for upliftment could not, therefore, apply to all these sections. . . . It is, therefore, desirable that the most backward communities amongst the Scheduled Castes and Scheduled Tribes should be identified and special programmes should be implemented for them by the Central as well as all the State Governments/Union Territory Administrations.[57]

Land Ownership. The importance of ownership of farmland can hardly be overemphasized in India, where 70 percent of the population depend on it for their livelihood. In the past, broadly speaking, law as well as poverty operated to deprive the scheduled castes of their share in the land. The affirmative programs envisage distribution of available farmland to the scheduled castes and the scheduled tribes. Two important sources of land are: (1) cultivable wastelands and (2) surplus land obtained by imposition of ceilings on agricultural holdings. As regards the former, the Elayaperumal Committee noted that till August 1965, 3,916,676 acres of wasteland was distributed among the scheduled castes.[58] As regards the second, the state governments throughout India imposed ceilings on landholdings as a measure of social justice. The national guidelines provide that in the matter of allotment of surplus lands, preference should be given to landless laborers drawn from the scheduled castes and the scheduled tribes. Figures indicate that 529,392 acres have been distributed among the scheduled castes and the beneficiaries are 431,600 landless workers. The corresponding figures for the scheduled tribes are 248,639 acres and 126,392 beneficiaries.[59] However, it may be noted that notwithstanding the distribution of wasteland among these groups, during the period 1961-71, the number of cultivators among the scheduled castes declined from 378 to 279 per thousand, and from 681 to 576 per thousand among the scheduled tribes.[60] One reason for this could be that "many a time poor Scheduled Caste/Scheduled Tribe farmers have to lose their lands to money lenders from whom they borrow money at exorbitant rates."[61] The Bhola Paswan Commission suggested that there should be a law to prevent alienation of land by the scheduled castes.[62]

It may be noted that the position in the case of scheduled tribes is different. As noted earlier, they suffered from isolation rather than discrimination. In some regions, their position is no different from that of the scheduled castes, but in other regions they owned land. In their case, however, the nontribals, taking advantage of their innocence, ignorance, and illiteracy, purchase their lands at unconscionably low prices. Eleven states have enacted legislation prohibiting the transfer of land by a tribal to a nontribal. In three other states, the consent of a revenue official or other competent authority is necessary for transfer of land to a nontribal.[63] There are schemes to allot house sites to landless workers for construction of houses. Under these, till the end of 1978, out of 16,050,417 eligible families, 7,654,409 have been allotted house sites.

Education. There has been considerable rise in education of the scheduled castes and scheduled tribes as a result of the post-Independence educational programs. The policy-makers envisaged education as a major instrument for the social and economic uplift of these groups. Apart from reservations in educational institutions, the major programs that have been developed for the purpose are: (1) exemption from school fees, (2) provisions for stipends or scholarships, (3) provisions for facilities like book grants, and (4) maintenance of hostels, or assistance to hostels for students from the scheduled castes. The central government provides for or sponsors the following: (1) postmatric scholarships, that is, for college education, (2) award of travel grants and (3) 7.5 percent reservation in favor of scheduled castes in merit scholarships. The programs also provide for assistance by way of special coaching for scheduled caste and scheduled tribe students residing in hostels and preexamination coaching facilities for students appearing in competitive examinations.

Impressive progress has been registered by these measures, although much still needs to be done. In 1931, the literacy among the scheduled castes was 1.90 percent as against the general literacy of 9.6 percent. In 1971, the literacy rose to 14.71 percent as against the general average of 29 percent. Thus the coefficient of equality rose from 25 percent to 50 percent.

$$\text{Coefficient of equality} = \frac{\text{Percentage of enrollment of S.C's to the total enrollment}}{\text{Percentage of S.C. population to the total population}}$$

Among the noteworthy features of affirmative action in the field of education is the institution of the postmatric scholarship scheme, that is, scholarships to finance education after the high school stage. The number of scheduled caste students who utilized it in 1944 was 114, and it steadily increased to 390,000 in 1978-79. The number of scheduled tribes pupils availing the benefit in 1978-79 was 70,000.[64]

Chitnis points out a major drawback of the policy of educational reservations, namely, that it "seems to take poor cognizance of the issue of academic preparedness or standards." The policy assumes that given a leverage at the time of admissions, the students will somehow adapt to academic requirements. On this she concludes:

> To reserve, on the purely ascriptive criterion of caste, admission into a system that is essentially achievement-oriented in character and to do so without requiring any additional academic inputs to improve the performance of those who may be admitted in spite of being educationally backward, seems really to have been a sad mistake.[65]

The criticism is valid. It may also be pointed out that the state of Madhya Pradesh, in order to fill the reserved seats, reduced the eligibility requirements in medical colleges to the absurd level of 15 percent. Such a step will undermine the image of professionals drawn from these groups. Chitnis further refers to the following problems of a serious nature encountered in this context: (1) reluctance of prestigious educational institutions to reserve admissions, (2) inability of students admitted under reservations to cope with academic requirements, (3) restrictions of admissions to prestigious courses to the economic elite from among the scheduled castes, (4) a highly uneven representation of different scheduled castes in education, (5) cheating and misrepresentation in the use of the facility of reservations, and (6) a growing resentment against scheduled castes on the part of the nonscheduled castes. Of these consequences, 4 and 6 noted above need special mention here.

Evaluation studies indicate that a few castes among the scheduled castes are cornering the benefits. As an example, we may quote the following from the Bhola Paswan Report with reference to Haryana:

> Caste-wise analysis of the [postmatric scholarship] Scheme reveals that only 18 castes out of the 37 castes listed in the State were represented in the undergraduate course. Of these the Chamar caste constituted 79.97%, Dhanka 6.52%, Balmiki 5.33%, Khatik 1.91% and Od. 1.32%. All the other castes had less than 1% representation. In case of Post-graduate level 13 castes had representation, the major beneficiaries being Chamar (64.87%), Dhanka (7.22%), Balmiki (3.61%) and Megh (2.40%).[66]

That corrective action need be taken to fulfill the objectives behind the reservation is reflected in the following recommendation of the 26th Report:

> As a result of various educational development schemes, the first generation graduates from educationally backward Scheduled Tribe

> communities and numerically and educationally weak Scheduled Caste communities have to face competition from comparatively more educationally advanced Scheduled Caste/Scheduled Tribe communities which result in denial of employment opportunities to them. This calls for a positive discrimination in favour of educationally less advanced Scheduled Caste/Scheduled Tribes communities in giving them educational facilities and employment opportunities.[67]

Tensions. The implementation of affirmative action programs for three decades has given rise to social tensions. These are reflected in the atrocities against the constitutionally preferred groups and in antireservation stirs.

The term "atrocity" is used in official and unofficial reports to denote "cases involving grave offences like murder, rape, arson, violence resulting in grievous hurt and such other cases." The following table shows the rise in atrocities:

Year	Number of Cases of Atrocities		Total[68]
	S.C.	S.T.	
1976	6,197	1,065	7,262
1977	10,879	1,138	12,017
1978	15,053	1,632	16,685
1979	13,426	367	13,793

The 26th Report points out disputes over minimum wages as an important factor responsible for the atrocities. The other reason for atrocities is agrarian tensions. When surplus land, obtained by the imposition of ceilings, is distributed among the landless scheduled castes or tribes, the persons affected thereby try to wreak vengeance against the allottees.

Reservations have given rise to a distinct trend toward an organized demand for the abolition of reservations. In the state of Gujarat, a section of doctors demanded abolition of reservations in postgraduate medical courses, which subsequently spread to other parts of the state, resulting in violent incidents. Also, there can be no doubt that the principle of reservations in promotions has given rise to much discontent among the government employees. The nonscheduled caste and nonscheduled tribe employees formed associations to press their demand for the abolition of reservations. The commissioner for the scheduled castes and the scheduled tribes recommended that disciplinary action should be taken against the employees participating in demands for abolition of reservations But the Department of Personnel, on the other hand, is of the view that the activities in question do not constitute violation of conduct rules. It should be noted that right to form associations is a fundamental right under the Indian Constitution.

As regards efficiency, there can be no doubt that reservations affect efficiency in services. This has been generally assumed both by the supporters and by the opponents of reservations--though the supporters of reservations deemphasize efficiency. We have noted that Article 335 of the Constitution subordinates reservations to considerations of efficiency. However, regrettably there are, as yet, no studies on the nature and extent of impairment of efficiency arising out of reservations in services.

Though there is still much to be achieved in the field of affirmative action, nonetheless it is relevant to add a note of caution. Reservation is a useful way to achieve short-term objectives, but its prolonged continuation will be inimical to the long-term goals and values of a nation, like fraternity and efficiency in society. The beneficiaries of affirmative programs are chosen on ethnic considerations, and in due course the ethnic groups acquire a vested interest in reservations. The Indian experience with respect to the other backward classes suggests that reservations, when once given, cannot be withdrawn subsequently, and thus tend to perpetuate themselves. They give rise to similar demands from other ethnic groups and one notices a competition for recognition as being "backward." After an initial period of result in terms of social justice, the law of diminishing returns appears to operate, for, as noted earlier, the advanced sections among the disadvantaged groups tend to siphon off the benefits. The system has not, as yet, shown resilience to transform the ethnic criterion for affirmative action to a status of underprivileged groups. Thus, the need for finding checks and balances in the system of affirmative action to fulfill the social-justice objectives still remains.

NOTES

1. Andre Beteille, The Backward Classes and the New Social Order (New Delhi, Oxford University Press, 1981), p. 41.

2. The great law-giver of Hindus in ancient times (200 B.C.-A.D. 200). His work Manu Smriti was considered as an unquestionable authority and held sway till recent times.

3. Laws of Manu, X, The Sacred Books of the East Series, 50 volumes, vol. 25 (1964), reprint (Motilal Banarsi Das, Delhi, ed. F. Max Muller, translated by G. Buhler), p. 51.

4. See generally P. V. Kane, History of Dharmasastra, vol. II, 2nd ed. 5 vols. (Bhandarkar Oriental Research Institute, Poona, 1974), p. 168.

5. The traditional Hindu society was divided into four castes, namely, the Brahmins (the priestly caste), the Kshatriyas (the warrior caste), the Vaishyas (the trading caste), and the Shudras (the servile caste).

6. Article 46, the Constitution of India.

7. Railways, airways, defense production, insurance, oil exploration, all major banks, and the major portion of steel and fertilizer production are owned by the state.

8. Article 15(1), the Constitution of India.

9. Article 15(4), the Constitution of India.

10. "There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State," Article 16(1), the Constitution of India.

11. Article 16(4), the Constitution of India.

12. Per K. Iyer, in State of Kerala v. N. M. Thomas, All India Reporter, 1976 S.C. 490, 528, per Fazl Ali id. at 552. Also per Ray, C.J., id. at 500.

13. Regents of University of California v. Bakke, 98 S. ct. 2733, 2757 (1978).

14. Article 335, the Constitution of India.

15. All India Reporter, 1959, S.C. 1318.

16. Article 330, the Constitution of India.

17. Article 341: "Scheduled Castes--(1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or part of or groups within castes, races or tribes which shall for the purpose of this Constitution be deemed to be Scheduled Castes in relation to that State or Union Territory as the case may be."

18. Article 342: "Scheduled Tribes--(1)The President may with respect to any State or Union Territory and where it is a State, after consultation with the Governor thereof by public notification specify the tribes or tribal communities or part of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be."

19. The actual number of castes will be considerably less, for the same caste may be repeated in the lists of other states.

20. Basavalingappa v. Munichinappa, All India Reporter, 1955 S.C. 1260.

21. On this see G. Austin, The Indian Constitution: Cornerstone of a Nation (1974 reprint, Oxford University Press, New Delhi), p. 154.

22. K. C. Alexander, "The Neo-Christians in Kerala," in Michael Mahar (ed.) The Untouchables in Contemporary India (Tucson, University of Arizona Press, 1972), p. 156.

23. All India Reporter, 1965, S.C. 1179.

24. Lok Sabha Debates, 1977, 6th series, vol. 7, no. 6 (Lok Sabha Secretariat, New Delhi), dated November 21, 1977, col. 367.

25. The Hindu Marriages Validity Act, 1946, and the Hindu Marriage Act, 1955.

26. All India Reporter, 1975, Del. 115.

27. Report of the Commissioner for Scheduled Castes and Scheduled Tribes (July 1978-March 1979), First Report (Delhi Controller of Publications, Government of India, 1980), para 5.44. (Hereafter referred to as the Bhola Paswan Report.)

28. All India Reporter, 1980, Del. 60.

29. Ibid. at 66.

30. Ibid.

31. Report of the Committee on Untouchability, Economic and Education Development of the Scheduled Castes and Connected Documents 1969 (Delhi, Controller of Publications, Government of India, 1976), p. 207. (Hereafter referred to as Elayaperumal Committee Report.)

32. Krishna Iyer, J., in State of Kerala v. Thomas, All India Reporter 1976, S.C. 490 at 527.

33. J. W. Nickel, "Preferential Policies in Hiring and Admissions: A Jurisprudential Approach," 75 Col. L. Rev. 537 (1975).

34. B. R. Gross, Discrimination in Reverse: Is Turnabout Fair Play? (New York, New York University Press, 1978), p. 33.

35. Walter Guzzardi, Jr. "The Right Way to Strive for Equality," The American Review, vol. 25(2) (1981), pp. 11 at 13.

36. Andre Beteille, Backward Classes and the New Social Order (New Delhi, Oxford University Press, 1982), p. 25.

37. All India Reporter, 1976, S.C. 490.

38. 351 U.S. 12(1955).

39. 372 U.S. 353 (1963).

40. All India Reporter, 1976, S.C. 490, at 517-18.

41. The argument is not made merely as a debating point. It may be recalled that Dr. Ambedkar, the great leader of the scheduled castes, advocated socialization of land after paying compensation to the existing owners.

42. Hayek says that the term "social justice" is "intellectually disreputable, the mark of demagogy or cheap journalism"; F. A. Hayek, Law Legislation and Liberty (3 vols. Routledge and Kegan Paul, London and Henley, 1976), vol. 2, p. 97; Allen says that he is not sure that "those who use the term most glibly know clearly what they mean by it"; C. K. Allen, Aspects of Justice (Oxford University Press, London, 6th ed., 1958), p. 31.

43. All India Reporter, 1980, A.P. 104, 115 (F.B.).

44. All India Reporter, 1962, S.C. 36.

45. Id. at 44.

46. All India Reporter, 1980, A.P. 104 (F.B.).

47. Id. at 114.

48. All India Reporter, 1963, S.C. 649.

49. All India Reporter, 1964, S.C. 179.

50. All India Reporter, 1976, S.C. 490.

51. All India Reporter, 1981, S.C. 298.

52. Sources: For 1957 and 1966, Handbook on Scheduled Castes and Scheduled Tribes (Office of the Commissioner for the Scheduled Castes and the Scheduled Tribes), pp. 88-89 and 91-92 (1968); figures for 1979 are taken from the 26th Report of the Commissioner for the Scheduled Castes and the Scheduled Tribes, part II (Delhi, Controller of Publications, Government of India, 1980), p. 25. (Hereafter referred to as the 26th Report.)

53. 26th Report, supra part I at 126-130.

54. Bhola Paswan Report, supra note 27 at 34.

55. 26th Report, supra note 52, part I at 9.

56. Bhola Paswan Report supra note 27 at 39 says: "This was partly due to ineffective and insufficient staff in the field."

57. 26th Report, supra note 52, part I at 102.

58. Elayaperumal Committee Report, supra note 31 at 117.

59. 26th Report, supra note 52, part II at 125-126.

60. Bhola Paswan Report, supra note 27 at 30.

61. Ibid.

62. Id. at 34.

63. For details see 26th Report, supra note 52, part II, at 126-127.

64. 26th Report, supra note 52 at 170.

65. S. Chitnis, "Reservations in Education--the Policy and Practice," in Removal of Untouchability (ed. V. P. Shah, Ahmedabad, Department of Sociology, Gujarat University, 1980), p. 5.

66. Bhola Paswan Report, supra note 27 at 188.

67. 26th Report, supra note 52 at 8.

68. Source: Id. at 231.

FEDERALISM, ETHNICITY, AND AFFIRMATIVE ACTION IN NIGERIA

L. Adele Jinadu

> By what means, then, are we to move men's hearts and bring them to love their fatherland and its laws? Dare I say? Through the games they play as children, through institutions that, though a superficial man would deem them pointless, develop habits that abide and attachments that nothing can dissolve.
>
> Jean-Jacques Rousseau, The Government of Poland

I

Introduction: Basic Theoretical Assumptions

Rousseau's problem is nowhere more acutely posed than in multiethnic polities. I want to explore, from a broad theoretical framework provided by consociational theory, the strategic utilization of affirmative-action-type policies in Nigeria to cope with citizenship problems created for the Nigerian polity by its heterogeneous ethnic composition. In the last section, I offer some conjectural comparisons of the Nigerian and United States experiences with the implementation of affirmative action policies.

I start with the assumption that constitutional forms are important and relevant for citizenship and managing political conflict. My basic theoretical assumption is, therefore, that political systems are forms of political technology, designed to achieve specific purposes. This derives from the Aristotelian notion of the constitution as an ethico-legal device that stipulates techniques like institutions, political structures, decision-rules and policies for achieving certain ends at which the polity aims. Viewed in this way, affirmative action is one of the alternative techniques or strategic decision-rules and policy options for dealing

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with problems of governance created by the dialectical relationship between federalism and ethnicity in Nigeria.

Another theoretical assumption is that affirmative action reflects a strategic shift from as well as a modification of the liberal theory of the state. Affirmative action accepts the validity of group rights and thus impliedly rejects the liberal faith in the political marketplace as an open and competitive one for reconciling or arbitrating individual interests. In the case of Nigeria, this leads to the proposition that affirmative action policies partly reflect a lack of faith in institutions based on the liberal theory of the state to resolve socioeconomic and political competition in the country. This is partly because one important feature of affirmative action policies is that they are generally designed to protect and therefore make justiciable the rights of ethnic groups.

The following questions are pertinent to the elaboration of these assumptions: What is affirmative action? What objections have been raised against it? What is its justification in Nigeria? What is the legitimate scope of affirmative action policies in the country? Are considerations relevant to affirmative action elsewhere, say in the United States, also relevant to the Nigerian situation?

These and other questions will be considered in the wider context of the relationship between federalism, as a limited form of consociationalism, ethnicity, and affirmative action in Nigeria. Moreover, the questions cannot be isolated from interesting considerations of the problematic nature of the interaction of political structures and institutional arrangements on the one hand, with political processes on the other hand; especially relevant is how the interaction is translated into policy choices and outputs. For example, a much more explicit constitutional guarantee of affirmative action in the 1979 Constitution than was the case before in Nigeria may be indicative of a disjunction between political processes and institutional arrangements. Affirmative action as a policy choice, reflected in constitutional provisions, will therefore represent an attempt to come to grips with the disjunction.

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II

Conceptual Clarification

I now attempt to clarify and give operational meaning to federalism, ethnicity, and affirmative action. I use these terms stipulatively in the following way. Federalism, as a form of political structure or institutional arrangement, is a system of concurrent regimes based on a constitutionally guaranteed division of powers and competence--legislative, executive, and judicial--shared by at least two levels of government. The aim of the arrangement is to avoid the concentration of powers in one plane of government. I argue later that federalism, so defined, is a special and limited type as well as method of consociationalism.

Ethnicity, as an aspect of political process as well as a form of political structure, refers to cleavages based on primordial attachments like language, religion, nationality, and race. It therefore refers to a particular type of social diversity or pluralism whose significance, especially in multiethnic societies, is that it provides a basis for pursuing corporate (i.e., ethnic) socioeconomic interests within a polity.

Since scarcity is necessarily a human predicament, ethnicity tends to be a crucial and critical source of political and other kinds of social conflict in such a polity. This may be owing to its being used as a relevant criterion for access to, or denial of access to, the consumption of public and private goods and for the allocation of political rewards. It is in this sense that ethnicity, as an aspect of the social structure of federalism in Nigeria, as elsewhere, has not only had an impact on but can also be regarded as an important aspect of political processes in the country.

Affirmative action, as policy choice, refers to redistributive measures or programs intended to favor ethnic groups that have been placed, either through conscious or unconscious design by others in the past, in a "disadvantaged" or "uncompetitive" socioeconomic and political position relative to other ethnic groups. Affirmative action measures, therefore, typically accept the validity of group as opposed to individual rights and generally involve important shifts in selection criteria for the enjoyment of such measures from merit to reform and desert. It is in this sense that affirmative action represents a policy choice dictated by the effect of the structure of ethnic relations on political process in Nigeria.

At least five categories of affirmative action programs have been identified.[1] First, there are measures designed to eliminate barriers such as overtly discriminatory rules of an institution, especially when such rules deliberately deny access to particular ethnic groups. Second, another set of affirmative action measures is targeted on hidden biases in the access routes of disadvantaged ethnic groups to institutions. A third category seeks to remove fundamental system bias against some ethnic groups inherent in the basic institutional and structural arrangement of a polity.

Fourth, there are "reverse discrimination" measures that allow disadvantaged ethnic groups access to institutions by admitting more of their members than would have been admitted through competitive selection processes. Fifth, there are measures aimed at providing representation for disadvantaged ethnic groups in proportion to their numbers in the general population.

I shall make clear later how affirmative action measures in Nigeria arose out of the demand of minority ethnic groups in the 1950s. These measures have generally fallen within the fourth and fifth categories of affirmative action enumerated above.

III

Ethnicity, Consociational Pluralism, and the Polity

Ethnic heterogeneity is a pervasive feature of the contemporary world system. David Nicholls has argued that "the relationship between political unity and social diversity continues to be of central importance in many parts of the world. Homogeneous states, where each citizen belongs to one integrated set of institutions in a single community, are fast disappearing."[2] Arend Lijphart has given wide currency to the notion of consociational pluralism as an institutional and structural principle of political organization that can be used to regulate political and other forms of competition in ethnically heterogeneous societies.[3]

I follow Lijphart in using consociational pluralism to refer to a set of structural and institutional arrangements for dealing with problems posed for a polity by ethnicity. But with respect to Nigeria, I add the proviso that there is need to view consociational pluralism (and therefore ethnicity) in the context of political competition among the political class and the low level of subjective class consciousness among the Nigerian working class and peasantry.

Ethnicity, therefore, poses an inherent design problem for the Nigerian polity. This is how to constitute a polity in which the associating ethnic groups will combine together in pursuing collective, i.e., national, goals without alienating their respective individual ethnic characteristics. Put differently, the problem is whether and if so, to what extent, the rights of ethnic communities for separate existence should be given constitutional and institutional recognition.

The problem is not only whether ethnic communities as such have rights that should be recognized, but also whether the institutionalization and protection of ethnic differences as a short-term strategy will not in the long run militate against national unity or integration. While the first question is essentially a theoretical question, the latter question is both theoretical and empirical in its focus on the conditions that will ensure unity.

I hasten to emphasize that not all multiethnic societies are consociationally plural or have adopted consociational arrangements to deal with the ethnic problem. In Africa, for example, the unpopularity of the federal solution as a consociational arrangement is not unconnected with the belief that it encourages regionalist and separatist tendencies, which "new" nations can ill afford.

IV

Elements of Consociational Pluralism

I now want to indicate basic elements of a consociationally plural polity. In doing so, I follow the usage of Lijphart and later apply it in a modified form to examine the operation of limited consociationalism in Nigeria's federal government. This modification is that, as I have already suggested, we view consociational pluralism in Nigeria, and indeed elsewhere, in the context of intraelite competition for power and, particularly in the case of Nigeria, the low level of the subjective class consciousness of the Nigerian working class and peasantry.

What are these basic elements? Lijphart has identified four such elements. First, and most important of all, is "government by a grand coalition of the political leaders of all significant segments of the plural society." Second, there is "the mutual veto" or "concurrent majority rule," which serves as an additional protection of vital minority interests. Third, there is acceptance of "proportionality as the principal standard of political representation, civil service appointments, and allocation of public funds." Fourth, there is "a high degree of autonomy for each segment to run its own internal affairs."[4] These four elements, particularly the third element, suggest that a consociational polity will be predisposed to affirmative-action-type measures.

Lijphart's elaboration of these four elements suggests at least two operational or strategic consequences of a consociational arrangement. First, the logic of the arrangement impels the various ethnic groups to seek alliances and support from outside of their respective groups. This is the more so in situations of competitive party politics. Secondly, premium tends to be placed on the politics of compromise. There is a limit to which any ethnic group can legitimately advance its claims or engage in brinkmanship, and beyond which the polity may disintegrate.

This concern with compromise is closely linked to the interrelated issues of the possibility for separatist tendencies (e.g., demand for more states or secession) in consociational arrangements and the "balance of advantage" in the polity. Thus viewed, the issue is not simply one of ethnic representation but one of domination. This much is clear from the recent political histories of Nigeria, Sudan, and Iraq.[5] Affirmative action might thus be viewed as a compromise policy measure in such circumstances. The effectiveness of cross-cutting political competition and the politics of compromise is therefore crucial for a consociation. It may provide a criterion for distinguishing between stable or unstable consociational polities. However, the issue of effectiveness is partly related to the issue of physical size and population. The preponderance of one ethnic group or a combination of them perpetually coalesced will result in their monopolization of politics. This will correspondingly give rise to uncompromising attitudes toward other ethnic groups.

Rousseau had expressed concern with the relationship of size to citizenship and, in spite of his distaste for sectionalism, had argued that "if there are partial societies, it is best to have as many as possible and to prevent them from being unequal."[6] John Stuart Mill, writing about federal systems much later than Rousseau, made the same point; and what Billy Dudley has described as "Mill's Law of Instability" in federal systems can be used to explain the collapse of Nigeria's First Republic (1960-66).[7]

This means that we need to relate the population size issue to the consociational principles of "mutual veto" and "grand coalition" in decision-making on matters of common or national concern. Although there may be no logical or analytical connection between consociationalism and federalism, and although the temptation to use the two terms interchangeably should be avoided, what the foregoing discussion suggests is that there is a strong and close connection between them. The suggested connection is that federalism is not only a special and limited type but also as a method of consociationalism; and that consociationalism is generalized federalism.[8]

V

Consociational Pluralism and Ethical Issues of Public Policy

Before examining Nigeria's federalism as a limited consociational polity, I want to refer to some ethical issues of public policy that are inherently and unequivocally posed by consociational theory and affirmative action. These issues have been much more starkly posed in recent

Nigerian discussion of the "federal character" concept than at any other time in the country's postcolonial political history. This way, one can examine the case for and against affirmative action as a policy response to ethnically generated demands on the Nigerian polity.

Two ethical issues are relevant. First, it is problematic whether there are properly speaking group as opposed to individual rights and interests. If it is proper to speak of group rights, this also raises the question whether such rights ought to be recognized as moral rights guaranteed and protected by the constitution and public policy measures as legal rights.[9]

The other ethical issue touches on principles of justice and fairness. It concerns selection criteria that should be used for the determination of a variety of public goods ranging from appointment to public offices, access to public institutions, and the allocation and distribution of public resources. This is particularly problematic insofar as the broad goal of public policy is to ensure equality among groups, defined as ethnic groups, and enable them to preserve their separate and distinct identities. The issue of affirmative action, defined for example as reverse discrimination or reparations as well as the alleged antinomy between merit and representation, is part of this wider issue. The two issues raise wider issues of social goals and social utility, especially what type of polity is to be created and the consequences of the preference of one value over another to the achievement of such a polity.

With respect to the first issue, I find Van Dyke's forceful argument that the liberal conception of human rights as individual rights is unduly limited a useful point of departure. As he points out, the liberal emphasis on individualism not only leaves liberals without an adequate theory of the state but also runs counter to historic precedents and contemporary practices that underline the fact that ethnic groups, among other groups, have moral and legal claims and rights that are and ought to be recognized and satisfied.

In the case of Nigeria, I have argued elsewhere that "the nature and particularly the structure of British colonial administration encouraged the development . . . of a theory of federalism based on a theory of nationalities or ethnic groups. The writings of Nigerian federalists tended to place emphasis less on Nigeria's federal qualities, as such, than on her heterogeneous ethnic mosaic."[10] There are at least two dimensions to this theory of federalism.

First, there is the strategic dimension that justifies federalism as a method of dispersing power and preserving ethnic autonomy and identity. Second, there is an economic dimension that sees federalism in terms of the equalization of the access of particularly the emergent petit-bourgeois leadership of these ethnic groups to public goods and their active and meaningful involvement and incorporation into the country's socioeconomic life. This is why I suggest that Nigeria's federalism is a limited form of consociationalism, much more similar in this respect to Yugoslav than U.S. federalism.

While the concern of articulate Nigerian political opinion with group rights was couched in this federalist or consociational language, it also must be realized that the language and therefore the justification of Nigerian nationalism, as indeed of African nationalism in general, was less an individualist than a group one. Independence was claimed, as both a moral and legal right, obviously not for individuals (although in a sense it is reducible to such a claim), but for a nation, subgroup of it, or a group of nations.

If there is no a priori reason for rejecting the moral and legal rights of ethnic communities, then there seems to be a theoretical or philosophical justification for some of the elements on which federalism as limited consociationalism rests. These are the principles of grand coalition, concurrent majority, and segmental autonomy. The principle of proportionality also rests on this theoretical basis insofar as it relates to the promotion of ethnic group interest, although it poses another set of theoretical problems, arising out of its being used as a criterion of selection, appointment, and allocation of public funds.

This leads to the second ethical issue of public policy posed in this section. This is a more controversial issue than the first one, although both issues are interconnected. This is because once we concede that ethnic groups have moral and legal rights and claims, we cannot avoid a question of applied ethics in cases where, as a result of conscious or unconscious design, some ethnic groups have been placed in a disadvantaged socioeconomic position relative to other ethnic groups. The ethico-practical question in such circumstances is, Should this situation of inequality be "reversed" or changed? Even if it is conceded that there ought to be a reversal, this in itself does not settle or resolve the question of which redistributive or compensatory criteria to adopt. I have suggested that it is the implementation of policies based on these redistributive criteria that is often referred to as affirmative action.

VI

Consociational Experiments in Nigeria Since 1960

To what extent has the Nigerian polity since independence in 1960 exhibited consociational elements? How are these elements related to affirmative action? These questions are best answered by dividing Nigeria's political history since 1960 into three periods: October 1960 to February 1966; February 1966 to October 1979; and since October 1979. This periodization should indicate not only some aspects of the dynamics of the consociational experiment in Nigeria but also the extent to which constitutional provisions to protect ethnic rights are translated into affirmative action policies.

During the October 1960-February 1966 period, only two consociational elements were explicitly incorporated into the 1960 Independence Constitution and the 1963 Republican Constitution. These were the mutual veto and segmental autonomy. These two constitutions contained a mutual veto in providing for an upper chamber, the Senate at the center, with equal representation from the three (later four) regions in the country. But this veto was not an effective one not only because the Senate could not delay legislation for more than six months but also because it was a "dignified" chamber. In design, the Senate was not meant to compete with the Federal House of Representatives, which had a more preeminent legislative role. Much the same is true of the second chamber, the House of Chiefs at the regional level.

The 1960 and 1963 Constitutions were federal constitutions. The distribution of legislative powers contained an exclusive federal list and a concurrent list, with the residue left to the regions. This distribution underlines the strength of the desire to entrench and safeguard segmental autonomy. However, both Constitutions also reflected what can be described as a trend toward federal preeminence in the legislative field in federal systems. For example, Sections 64 to 67 of the 1960 Constitution and Sections 70 and 71 of the 1963 Constitution conferred on the center the power to invervene in the conduct of regional governments under certain circumstances and conditions.

The presence of these sections raises the question whether the 1960 Constitution, like the Indian Constitution, would not be better described as quasi-federal. As it turned out, the center exercised its emergency powers under Section 64 and 65 of the 1960 Constitution when, in May 1962, it declared a state of emergency in the then Western Region, suspended the governor, the legislature, and the executive of the region and appointed a federal administrator in their place.

The emergency provisions and their application in May 1962 therefore suggest that, properly speaking, Nigeria during that period could not be regarded as a consociational polity. But segmental autonomy in consociational theory is not meant to be absolute autonomy. The unitary feature implied in the conferment of emergency powers on the center, though such powers could be abused, was intended to deal, by definition, with abnormal situations.

The issue of segmental autonomy during this period (1960-66) of Nigeria's political history was problematic in another respect. This is because the three (later four) regions were not ethnically homogeneous. Each, especially of the original three regions, contained significant ethnic minorities that, even before independence, staked claims for their own separate regions. This heterogeneous mosaic mix within each of the regions during this period was further complicated by two factors. First, owing to migratory and other ecological forces, the "nation" or ethnic group is not necessarily, in the Nigerian case, coterminous with state territorial boundaries. Secondly, within each of the numerically superior ethnic groups in each of the regions, there are also significant differences.

The issue of granting segmental autonomy to more ethnic groups was vigorously debated in the penultimate years before independence, especially since regional ethnic minorities were afraid that they would be perpetually dominated by the majority ethnic groups in their regions.

The solution adopted in the 1960 Independence Constitution to protect minority ethnic groups was twofold. First, a list of fundamental rights was included in the Constitution to guarantee and protect the political, civil, cultural, religious, and educational rights of minority ethnic groups within the regions. Secondly, a number of institutional and constitutional arrangements were designed to protect ethnic minorities. On the one hand, Section 27 of the 1960 Constitution and section 28 of the 1963 Constitution sought to ensure fair representation of ethnic minorities in the public services of the regions, by protecting members of such groups from disabilities that might arise out of "the practical application of any law in force in Nigeria or any executive or administrative action of the Government of the Federation or the Government of a Region . . . to which citizens of Nigeria of other communities . . . are not made subject."

These provisions, designed in response to minority ethnic group demand for segmental autonomy in the 1950s, represented a basic acceptance of affirmative action as a policy measure to contain ethnic assertiveness. Intergovernmental agencies, such as the Niger Development Board, were established to ensure the socioeconomic development of minority ethnic groups' areas. It was the fears of these minority ethnic groups over possible victimization by the majority ethnic groups that led to the deregionalization of the Nigeria Police Force and its replacement by a single Federal Police Force administered by a Police Council with federal and regional representation.

As the history of demands for state creation in Nigeria has shown only too well, these constitutional provisions and institutional arrangements neither allayed minority ethnic groups' fears nor quelled the demand for more states. Why has this been the case? The basic problem is that the provisions and arrangements did not significantly affect the overall "balance of advantage" in matters of socioeconomic development and public service appointments in the regions during this period. Donald Horowitz's thesis might be applied with some force to the Nigerian experience: "If neither prosperity nor security is advanced significantly by remaining in a large multi-ethnic state, then it would not be surprising to discover an increase in the number of ethnic groups that choose to opt out."[11]

What about the other two consociational elements: grand coalition and proportionality? The period between 1954 and 1957 was one during which Nigeria began to operate a system of responsible government. The office of prime minister was introduced in 1957, and the cabinet formed in the last three years before independence (1957-60) was a coalition of the three main parties--the Northern Peoples Congress (NPC), the National Council of Nigeria and the Cameroons (NCNC), and the Action Group (AG), representing the Northern, Eastern, and Western regions respectively. The idea was to present a united national front in the critical last years of colonial rule and to involve the three regions and by implication the ethnic groups that correspond to them in government at the center.

This leads to the issue of proportional representations in allocating ministerial, civil service, and other appointments during this period. Section 88 of the 1954 Constitution provided for the appointment of three ministers from each of the three regions and one from the Southern Cameroons. As a result, six ministers were nominated by the NCNC, which won a majority of the seats in the 1954 federal parliamentary elections in each of the Western and Eastern regions. Three ministers were nominated by the NPC, which had a majority in the Northern Region.

The provision was, however, deleted at the 1957 constitutional conference and was not included in the 1960 Constitution. However, there was during the 1960-66 period an acute awareness of the need for a broad-based federal executive to reflect the regional balance in the country. Even after the controversial 1964 elections, which returned the NPC to power with an increased majority, the federal cabinet was made up of ministers drawn from the four regions. As Watts has observed of the new federations, "most constitution-makers have recognized and even stressed the importance of balanced regional representation in the executive. Nevertheless as a rule they have preferred to leave this to convention, in order not to restrict the flexibility implicit in the cabinet system."[12]

Balanced regional representation was, however, provided in the Constitution in a number of statutory-stipulated appointments. Reference has already been made to the Nigeria Police Council, which was established under the 1960 and 1963 Constitutions to supervise "the organization and administration of the Nigeria Police Force and all other matters relating thereto (not being matters relating to the use and operational control of the force or the appointment, disciplinary control and dismissal of members of the force)."[13] Each regional government, in addition to the federal government, was to be represented on the council.

The constitutional provisions for the establishment of the Supreme Court were also designed to ensure balanced regional representation. Section 104-(1) of the 1960 Constitution stipulated that the judges of the Supreme Court must include the chief judge of each of the regions, in addition to the chief justice of the federation and "such number of federal judges (not being less than three) as may be prescribed by Parliament." There was also a Judicial Service Commission made up of, in addition to both the chief justice of the federation as chairman, and the chairman of the Public Service Commission of the federation as a member, the chief judge of each region.

But the nature of regional representation was changed in the 1963 Constitution. Section 112-(1) provided that "the Chief Justice of Nigeria and the Justices of the Supreme Court shall be appointed by the President, acting in accordance with the advice of the Prime Minister, so however that four of the Justices of the Supreme Court shall be appointed by the President, acting on the advice, as respects each of these Justices severally, of the Premier of a different Region."

However, with the exception of concern over representation of minority ethnic groups in the civil service, the 1960 and 1963 Constitutions did not extend the issue of proportionality to civil service appointments or admission to federal institutions. But, even then, there were during this period manifestations of what is now known as the "federal character" concept. In civil service appointments at the federal level, for instance, there was suspicion among Southerners, beginning from the early 1960s, that criteria other than merit were being used in the appointment and promotion of Northern officers in the executive and administrative classes of the federal civil service, in supersession of more qualified Southerners. As for admission to federal institutions, some places were reserved annually from the late 1950s on the Higher School Certificate class at King's College, Lagos, for qualified students from the Northern Region.

Let us turn to the 1966-79 period, which was one of military rule in Nigeria. To what extent was Nigeria consociational during this period? This question would seem superfluous since it was, by definition, a period of no-party rule. The question then turns on the compatibility of military rule with some of the consociational elements. It is arguable that the centralizing nature of military organization, together with its hierarchical command structure, is a negation of segmental autonomy and federalism. As part of the effect of this hierarchical command structure, reference can be made to the appointment of state governors by the central authority, the federal government. However, this fact does not necessarily mean that for most of the period of military rule, Nigeria did not operate a federal system.

Indeed, Nigeria operated as a federal system, with limited autonomy for the regions or states, during almost the whole of the period, the exception being a short period in 1966 (May to July) when an attempt was made by the regime of Major-General Aguiyi-Ironsi to introduce unitary government.

This suggests that we view federalism as a spectrum, with a highly peripheralized (or decentralized) form at one end and a highly centralized one at another end. Livingston's and Riker's notion of a federal spectrum combines a legalistic with a sociological process view of federalism. For instance, the fact of some substantial unitary features in Canada (e.g., the appointment of provincial lieutenant-governors and appointments to all important provincial judicial posts by the dominion or federal executive, and the investment of power of disallowance and veto in that executive) does not mean that Canada neither has a federal constitution nor a federal government. In Nigeria during the 1966-79 period, pressures for state or segmental autonomy made the system work as a federal one, in spite of military rule and suspension of parts of the 1963 Constitution.

It was during this period of military rule that more states were created in an effort to satisfy demands of minorities for autonomous states of their own. In 1967, the four-state structure inherited from the civilian regime was dissolved. It was replaced by a 12-state structure. The 1967 exercise was followed by another in 1976, when the 12-state structure was replaced by a 19-state structure.

It is a moot issue in Nigerian politics whether these two exercises had redressed the imbalance on which Northern political predominance was based. It is also problematic whether state boundaries can ever or should coincide with ethnic boundaries. The two exercises also raise questions about how an ethnic group is to be categorized or defined, not as a sociological or anthropological category, but as a basis or criterion for state creation. An underlying issue in all of this is whether ethnicity should be the only or principal criterion for state creation.

If we focus on the related consociational elements of grand coalition and proportionality, we shall find that the membership and composition of both the Supreme Military Council and the Federal Executive Council included state representation. For example, state military governors were members of the Supreme Military Council, and these military governors had to concur with the decisions of the Supreme Military Council. This was a veto that was effectively used during the latter part of General Gowon's regime by the military governors to assert and protect their autonomy. The Federal Executive Council during this period also included at least one member, invariably a civilian commissioner, from each of the states.

To what extent have consociational elements been reflected in the Nigerian polity since October 1979? The 1979 Constitution represents an attempt to reconstitute the Nigerian polity to meet the needs of the country. To this end, emphasis was placed by the architects of the 1979 Constitution on the nature of decision-rules and mode of exercising the rules.

The result is what is in design a thoroughly consociational federal polity. What is more, the idea of a consociation was extended as much to the federal level as to the state and local government levels. In other words, the home rule notion underlying federal-state relations was extended to state-local government relations. This was the underlying design strategy of a majority of the Constitution Drafting Committee to the problem of how to promote unity in a segmented or multiethnic society.

The key to this strategy is the notion of a "federal character." Constitutional provisions on the structures and institutions of the polity basically rest on this idea. But how novel is the notion? In a sense it is not novel, insofar as it can be said to mean "ethnic balancing," which it must mean if it is defined in operational terms. This operational definition suggests that the federal character notion is an instrumental one. It is instrumental in the sense that it aims at ensuring unity in diversity. But in the context of the 1979 Constitution, it is novel. This is because, unlike the practice in the 1960 and 1963 Constitutions, ethnic rights are now spelt out and conferred with the force of law and made legally enforceable. In other words, what was previously left to convention is now part of the laws of the country.

If operationally defined the notion has the strategico-legal aim of achieving unity in diversity, how is this to be done? The answer is provided in Section 14 of the 1979 Constitution as follows:

> 14.(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty thereby ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that government or any of its agencies.
>
> 14.(4) The composition of the Government of a State, a local government council, or any of the agencies of such government or council, and the conduct of the affairs of the government or council or such agencies shall be carried out in such manner as to recognize the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the peoples of the Federation.

How do these provisions relate to the elements of consociational theory? Let us start with the notion of a grand coalition. Section 135(3) enjoins that appointment of ministers of the federal government by the president must conform to the provisions of Section 14(3), quoted above.

> Provided that in giving effect to the provisions aforesaid the President shall appoint at least one Minister from each State, who shall be an indigene of such State.

With respect to the state executive, Section 173(2) stipulates that appointments to the office of commissioners (i.e., cabinet members) of a state by the governor of that state must conform to Section 14(4) quoted above.

But it may not be easy to comply with these provisions or to determine what they mean or to reflect them in appointments to public offices. Alhaji Shehu Musa, secretary to the government of the federation, has highlighted some of the conceptual and practical problems of implementation posed by these sections:

> First and foremost, a citizen belongs to a State, then to a tribe (in the ordinary common sense), to a religion and lastly to a Political Party. At the same time that very individual has a profession, has an occupation and belongs to one or more associations. In a two-dimensional matrix, say vacancies to be filled and state, the problems of implementation are minimal. But the provision "Federal Character" involves much more than vacancy/state relationship. If this were intended, I have no doubt that the makers of the Constitution would not have hesitated to use the expression "Geographical spread." . . .
>
> The trouble is with the provision for "other sectional groups"--political party inclination, occupation, profession, association, etc. . . . One interesting thing which has further complicated the setting up of operational rules for the purpose of reflecting "Federal Character" is that a person belongs to at least five elements, namely, State, Tribe, Religion, Party and either occupation, profession or association.[14]

The notion of a grand coalition was extended to a number of federal executive bodies listed in Section 140(1). These are the Council of State, the Federal Electoral Commission, the National Economic Council, and the National Population Commission.

The decision-rules about the election of the president provide a point of departure for examining the extent to which another consociational element, the mutual veto, is reflected in the 1979 Constitution. These decision-rules stipulate a greater-than-simple-majority vote. It therefore becomes imperative for a presidential candidate to seek as wide an ethnic and geographical base as possible for electoral support.

By making these decision-rules as all-inclusive as possible, a high degree of autonomy, and therefore a virtual veto, is reserved for the ethnic group. Section 126(1) states as follows:

> A candidate for an election to the office of President shall be deemed to have been duly elected where, there being only 2 candidates for the election--
> (a) he has a majority of the votes cast at the election; and
> (b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation.

Similar provisions--Section 164(7)--are stipulated for gubernatorial elections. The successful candidate in each state is required to secure, in addition to the highest number of votes cast, "not less than one-quarter of all the votes cast in each of at least two-thirds of all the local government areas in the State."

A third consociational element is proportionality in public service appointments and in the allocation of public revenue among the component units of the federation. Section 157(5) of the 1979 Constitution stipulates that in making appointments to certain categories of offices in the public service of the country, "the President shall have regard to the federal character of Nigeria and the need to promote national unity." The offices are the secretary to the government of the federation, head of the Civil Service of the federation, ambassador, high commissioner or other principal representative of Nigeria abroad, permanent secretary or other chief executive in any ministry or department of the government of the federation, and any office on the personal staff of the president.

The "federal" character concept also applies to appointments to the chairmanship and membership of Boards of Directors of government parastatals. How has this concept been applied? When the 1979 Constitution came into effect on October 1, 1979, "one Permanent Secretary hailed from Imo, Rivers, Plateau, Gongola, Kano, Kwara, Cross River and Niger States."[15] Immediate steps were taken to bring this situation in line with the spirit of the federal character clause. Table 1 below reflects the distribution of the permanent secretary cadre by state of origin in May 1982.

As for appointments to chairmanship and membership of Boards of Directors of federal government parastatals, the emphasis has tended to be on geographical spread. But effort is also made "to ensure that all states have approximately equal representation on each category of Board and that there is no bunching in the area of chairman of the Boards or the membership."[16]

At the state level, the governor is similarly expected (Section 188[4]) to "have regard to the diversity of the people within the state and the need to promote national unity" in making appointments to certain officers in the State Public Service. Much the same consideration is

Table 1

Distribution of Federal Permanent Secretary in May 1982 by State of Origin

State	No. of Permanent Secretary	State	No. of Permanent Secretary
Anambra	2	Kwara	2
Bauchi	1	Lagos	2
Bendel	8	Niger	1
Benue	2	Ogun	1
Bornu	2	Ondo	2
Cross River	1	Oyo	2
Gongola	1	Plateau	1
Imo	1	Rivers	2
Kaduna	2	Sokoto	3
Kano	1		

expected to be given to appointments to chairmanship and membership of Boards of Directors of the parastatals of state governments.

The "federal character" notion is also extended to the composition of the officer corps and other ranks of the armed forces of the federation. In addition, Section 199 empowers the National Assembly by an act to "establish a body which shall comprise such members as the National Assembly may determine, and which shall have powers to ensure that the composition of the armed forces of the Federation shall reflect the federal character of Nigeria." This concern itself is not new, since recruitment and promotion practices in the Nigerian armed forces even before 1979 had generally taken the ethnic factor into consideration by aiming for some form of ethnic balancing.[17]

What about the allocation of public revenues among the various states? The issue of revenue allocation has always been a bone of contention in Nigeria. The contention is as much about the basis or principles of allocation as it is about the quantum of allocation between the various levels of government.

Viewed as part of the federal finance problem, the revenue allocation issue is important because of the need to ensure that division of revenue between the federal government and unit governments not only corresponds to the division of constitutional functions but also does not compromise the autonomy of either level of government. The principles of allocation have varied over time, with prominence being given to derivation in the 1950s, need in the early 1960s, and equity and even development in the 1970s.

In order to ensure the financial autonomy of the various regions, the 1960 and 1963 Constitutions, in Sections 131-134 and 137-40 respectively, guaranteed unconditional transfers of revenue. A variation of unconditional grants stipulated in these Constitutions is the combined distributable pool. This term refers to the combined proceeds of a group of federal taxes, a certain minimum percentage of which is to be allocated as the share of the states and which is subject to variation by federal legislation. The tables below show the tax jurisdiction and allocation of revenue under the 1963 Constitution.

The constitutional allocation of revenue between the federal and state governments and the local government councils under the 1979 Constitution is contained in Sections 149-154 and in Items A and D of Part II, Second Schedule. The National Assembly and Houses of Assembly of the states are empowered within their respective subjects and areas of competence to prescribe the formula and manner of the allocation.

I have sought in this section to examine an aspect of Nigeria's political history with some pertinent bearing on the theme of this conference. I have thus focused not only on the bases or criteria for power sharing and social integration in Nigeria, but also on the philosophical or theoretical underpinnings of the Nigerian polity. I referred to institutional strategies used to promote, if not ensure, power sharing and social integration. I related these institutional strategies to the

Table 2

Tax Jurisdiction under 1963 Constitution

Federal	State
1. Import duties	1. Personal income tax (administration)*
2. Export duties	2. Sales and purchase taxes on produce and other commodities
3. Excise duties	3. Entertainment tax
4. Mining rents and royalties	4. Cattle tax
5. Petroleum projects tax	5. Football pools and other betting taxes
6. Companies' income tax	6. Capital gains (administration)
7. Personal income tax (legal basis)	7. Motor vehicle tax and driver's license fees
8. Capital gains tax (legal basis)	

Source: Federal Republic of Nigeria, Reports of Constitution Drafting Committee, vol. II, p. 132.

* Personal income tax (legal basis) originally under state jurisdiction was transferred to the federal government in 1975 while the administration and retention of revenue remained with the state. The same applied to capital gains tax.

Table 3

Allocation of Revenue under the 1963 Constitution

		Federal %	State %
I.	Import Duties		
	(a) Tobacco	-	100
	(b) Beverages--beer, wine, and spirits	100	-
	(c) Motor spirit and fuel	-	100
	(d) Other imports	65	35
II.	Export Duties		
	Produce, hides, and skins	-	100
III.	Excise Duties		
	Except tobacco and motor fuel	100	-
	Tobacco and motor fuel	-	100
IV.	Mining Royalties and Rents	15	85
		(35% only being through Distributable Pool Account.)	

Source: Federal Republic of Nigeria, Reports of the Constitution Drafting Committee, vol. II, p. 133.

Notes: (1) Decree No. 6 (1975) stipulated that 50% of all excise go to the federal and 50% to the state governments. (2) As of 1976, 20% of on-shore receipts was going to the state of origin and 80% to the Distributable Pool Account, while 100% of the off-shore receipts went to the Distributable Pool Account. (3) In 1970, the formula for sharing the revenues was changed to 50% of the Distributable Pool Account fund to the state on the basis of equality of states and 50% on the basis of population.

consociational elements of the grand coalition, mutual veto, proportionality, and segmental autonomy.

The adoption of these strategies, especially under the 1979 Constitution, is explicitly based on the acceptance of the claims of ethnic groups to moral and legal rights and interests. These strategies also involve a corresponding rejection of a single majoritarian polity based on one-man one-vote. In other words, the Nigerian polity is a society of ethnic groups and not of individuals. The justification of federalism as limited consociationalism in Nigeria is thus that, by recognizing these group rights, it should provide and perhaps ensure access to and meaningful participation in the economic and sociopolitical processes of the country by the various ethnic groups. It should conduce to stability and more egalitarian polity. It is no doubt problematic whether this justification conforms with political practice.

VII

The Nigerian Polity and Affirmative Action

The relationship between federalism as limited consociationalism and affirmative action in Nigeria is that the latter in a sense is dictated by the logic of Nigerian federalism. This is to say affirmative action is partly a policy measure designed in response to practical problems of governance posed by the conjunction of federalism and ethnicity in Nigeria. If Nigerian federalism cannot be understood without being situated in the context of the social structure of the country's ethnic relations, much the same can be said of affirmative action. By the same token, the justification for affirmative action in the country is to be sought in the justification for federalism, namely, in the end for which a federal arrangement is concluded.

If affirmative action typically involves a departure from conventional selection criteria and procedures in, for example, education and employment in order to secure group reparations, redistribution, and social integration, then what is its scope or extent in Nigeria?

The determination of "conventional selection criteria and procedures" is not unrelated to concern with justice and fairness. When applied to questions of admissions and appointments, for example, this concern can be reduced to the application of the merit principle. Thus, the relevant rules guiding admissions to educational institutions, for example, will accord preferential treatment to high scorers as against low scorers in the relevant tests administered. In such circumstances, considerations of ethnic, religious, or national origins are irrelevant. To introduce any of these considerations so that some low scorers are preferred over high scorers is unjust and unfair.

But the matter is not so easily disposed of, as the rules and the procedures for implementing them may be questioned. For example, strict compliance with test scores may historically have been used to keep or may have had the effect of keeping certain groups out of certain institutions. The evaluators or assessors may not be unbiased. In the Nigerian situation, this kind of argument has been used, particularly by Northerners, against the competitive nature of some nationally conducted examinations. Their argument is not only that evaluators exhibit cultural or ethnic bias, but also that some high scorers engage in examination malpractices.

The scale of merit used is not itself foolproof or unproblematic. There may also be systemic or structural factors that favor some groups, therefore placing them in a more advantageous position than others. In such circumstances, the requirement of distributive justice may demand some attenuation or dilution of the merit or "conventional selection criteria" principle. This in itself represents a justification for affirmative action measures to redress such a situation.

Moreover, it can be argued that there are other criteria that ought to be considered. For example, the emphasis may be on need as opposed to ability. The departure from ability or the merit principle is also justified on utilitarian grounds in terms of its beneficial social consequences.

Let us now look at the scope of affirmative action in the context of current policy on education at the federal level in Nigeria since the 1970s, when the basic objectives of a national educational policy were laid down in the Second National Development Plan, 1970-74. The basic problem that this policy was designed to deal with is the educational imbalance, which is roughly on a North-South axis, in the country with the advantage lying with the South.[18] This particular imbalance was due partly to British colonial administrative practice, and also partly to cultural and religious factors that gave rise to differential responses to the diffusion of western education in the North and South.

But within the South, as within the North itself, there were pronounced imbalances and sizable pockets of educationally backward areas. The problem for which affirmative action as reverse discrimination or the adoption of a quota system is an answer is thus the eradication or mitigation of this kind of imbalance. Part of the justification for affirmative action is that to the extent to which the imbalance constitutes a barrier to national integration and even development, then conscious effort must be made to remove the imbalance. Affirmative action is thus justified as a measure to bring about the desired state of affairs. But affirmative action in education is viewed also as a means for achieving some equitable distribution of employment in the various sectors of the economy along ethnic lines. The socioeconomic aim (as well as justification) is the broadening on an ethnic basis of the educated population in the country, or of the emergent petit-bourgeoisie.

In view of this sizable number of educationally backward or disadvantaged ethnic groups and states, a national educational policy on admissions to certain categories of federal educational institutions was worked out in the 1970s. The aim as well as the justification was (and is) to elevate the disadvantaged states to an equal status, such that candidates from those states can compete more effectively with the rest of the country. Policy therefore is aimed at bridging or narrowing the gap. This also constitutes its justification. But how is this to be done?

The answer seems to have been that, since their educationally disadvantaged position is partly a legacy of the past, then considerations of social justice demand that they should be offered special protection; otherwise , the educational gap cannot be bridged or narrowed in open competition, based purely or exclusively on the merit principle. It therefore becomes imperative to reserve a certain number of places for them in federal educational institutions. But it is unclear whether this is purely a stopgap, ad interim measure.

It is the pursuit of this deliberate policy that has generated heated controversy in Nigeria, as it has done in India and the United States, with respect to competitive examinations and admissions to law schools respectively.[19] As should be expected, the controversy has generated more emotional than reasoned analysis of the merits and demerits as well as the applied social-ethical aspects of the policy.

Although the 1979 Constitution stipulates that federal institutions, including educational ones, must reflect federal character in their composition, the policy as a deliberate one was consciously designed and pursued during the period of military rule. But even then, the idea was behind the establishment of the "unity schools" in all the regions of the federation in the early 1960s. It was during this period that the King's and Queen's Colleges in Lagos, established during colonial rule, also began to reflect federal or national character in their admissions policy. What was the character of the policy as applied to the secondary and tertiary levels of Nigeria's educational system, i.e., secondary, teacher training, technical, and university education?

The present admission policy guidelines into all the federal government colleges and federal government girls' colleges in the 19 states are as follows:

19 federal government colleges 19 federal government girls' colleges	20 percent national merit 50 percent state quota 30 percent environmental quota

schools which are located in a few states and which as a result apply a different admissions guidelines, as follows:

7 federal schools of arts and sciences	20 percent merit
King's College, Lagos	80 percent state quota

Because of their location in a few states, the "environmental" criterion is not included, hence the corresponding increase in the state quota.

With respect to teachers' training colleges and federal polytechnics, the admission policy is the same as for the federal schools of arts and science for the same reason, namely, their location in a few states:

7 federal advanced teachers' colleges	
2 national technical teachers' colleges	20 percent merit
1 federal technical college (Trade Centre, Lagos)	80 percent state quota[20]

The application of the federal character concept to admission guidelines to federal government universities distinguishes between the "old" and "new" universities. Because of the vital importance of this level to manpower and developmental needs, and "in order to ensure an increased number of qualified students from the educationally less developed areas, the Federal Government assisted 11 states to establish schools of basic studies. It also requested 7 universities to run preliminary courses with intake from these areas."[21]

But the discussion of university education, as indeed of the other levels referred to above, cannot and should not be discussed in isolation from the question of the geographical spread or location of federal universities. The goal may be "to achieve an even spread in the economic benefits inherent in the establishment and operation of university institutions," although ". . . the creation of universities in line with the principle of federal character will improve the positions of those states with a large number of candidates for university education."[22]

The formulation of admission policy to federal government universities was based on the same assumption of the need to balance merit with need that characterized policy on the other levels of the educational system. The policy guidelines that were eventually formulated for the various federal universities were worked out after consultations between the federal government, the National Universities Commission, and the universities. During the 1981-82 selection exercise, the federal universities were requested to include, in addition to the merit criterion, such other criteria as factors of educational disadvantage, federal character, and catchment area in their admission.

The guidelines eventually laid down for each federal university are to be strictly applied, and the National Universities Commission has been directed by the president-in-council to work out a system of inducement grants and penalties for universities that comply or fail to comply respectively with the guidelines that apply to them. The guidelines laid down for each federal university are as follows.[23]

(a) Ahmadu Bello University
  - (i) 40 percent merit from all the 19 states of the federation;
  - (ii) 30 percent for students from the locality of the university;
  - (iii) 20 percent for students from educationally less developed states;
  - (iv) 10 percent others; to be left to the discretion of the university.

(b) Bayero University, Kano
  - (i) 30 percent national merit from all the 19 states;
  - (ii) 30 percent for students from the locality of university;
  - (iii) 30 percent for students from educationally less developed states;
  - (iv) 10 percent others; to be left to the discretion of the university.

(c) University of Benin
  - (i) 40 percent merit from all the 19 states of the federation;
  - (ii) 30 percent for students from the locality of the university;

(iii) 20 percent for students from educationally less developed states;

(iv) 10 percent others; to be left to the discretion of the university.

(d) University of Calabar

(i) 30 percent national merit from all the 19 states;

(ii) 30 percent for students from the locality of the university;

(iii) 30 percent for students from educationally less developed states;

(iv) 10 percent others; to be left to the discretion of the university.

(e) University of Ibadan

(i) 40 percent merit from all the 19 states of the federation;

(ii) 30 percent for students from the locality of the university;

(iii) 20 percent for students from educationally less developed states;

(iv) 10 percent others; to be left to the discretion of the university.

(f) University of Ife

(i) 40 percent merit from all the 19 states of the federation;

(ii) 30 percent for students from the locality of the university;

(iii) 20 percent for students from educationally less developed states;

(iv) 10 percent others; to be left to the discretion of the university.

(g) University of Ilorin

(i) 30 percent national merit from all the 19 states;

(ii) 30 percent for students from the locality of the university;

(iii) 30 percent for students from educationally less developed states;

(iv) 10 percent others; to be left to the discretion of the university.

(h) University of Jos

- (i) 30 percent national merit from all the 19 states;
- (ii) 30 percent for students from the locality of the university;
- (iii) 30 percent for students from educationally less developed states;
- (iv) 10 percent others; to be left to the discretion of the university.

(i) University of Lagos

- (i) 40 percent merit from all the 19 states of the federation;
- (ii) 30 percent for students from the locality of the university;
- (iii) 20 percent for students from educationally less developed states;
- (iv) 10 percent others; to be left to the discretion of the university.

(j) University of Maiduguri

- (i) 30 percent national merit from all the 19 states;
- (ii) 30 percent for students from the locality of the university;
- (iii) 30 percent for students from educationally less developed states;
- (iv) 10 percent others; to be left to the discretion of the university.

(k) University of Nsukka

- (i) 40 percent merit from all the 19 states of the federation;
- (ii) 30 percent for students from the locality of the university;
- (iii) 20 percent for students from educationally less developed states;
- (iv) 10 percent others; to be left to the discretion of the university.

(l) University of Port Harcourt

- (i) 30 percent national merit from all the 19 states;
- (ii) 30 percent for students from the locality of the university;
- (iii) 30 percent for students from educationally less developed states;

(iv) 10 percent others; to be left to the discretion of the university.

(m) University of Sokoto

(i) 30 percent national merit from all the 19 states;

(ii) 30 percent students from the locality of the university;

(iii) 30 percent for students from educationally less developed states;

(iv) 10 percent others; to be left to the discretion of the university.

(n) The Federal Universities of Technology

(i) 20 percent from locality of the universities;

(ii) 80 percent to be left to the discretion of the universities. The universities are, however, enjoined to ensure that they admit their students from all over the country.

It should be clear from the various guidelines that the affirmative action considerations reflected in them are those relating to reverse discrimination and proportional representation. As I have pointed out earlier, the category of affirmative action designated as reverse discrimination is intended to allow disadvantaged groups access to institutions by admitting more of their numbers than would have been admitted through open competitive selection processes. But insofar as this is linked with the federal character concept, the consociational element of proportionality or quota is also an underlying rationale of affirmative action in education. But the consociational element of segmental autonomy is also implied in the criterion of environmental or catchment area factor, stipulated for admission to some of the institutions.

What needs to be pointed out, however, is that, even with respect to the state quota and environmental factors, the merit criterion is not ruled out altogether. This is because of the notion of national minimum standards that must be met before any candidate is admitted to any of the universities. There are basic requirements for admission at all levels of the educational system. This then means that at the state and "environmental" levels, the competitive merit competition is to be applied. It is of course possible that some candidates who score lower than others may gain admission while some who scored higher than they may fail to gain admission.

But this is a problem with the application of the criterion and not necessarily with the criterion itself. It has to be realized that the merit criterion is not the only criterion. Nor is it error-proof in application. It is not unusual for admissions officers or "gatekeepers" to look at other than numerical indicators in processing application forms. For example, entrance examinations results are often complemented with interviews for admissions to secondary schools.

All that this underlines, however, is the need to reject too narrow a conception of merit which is limited to numerical indices. Additionally, it is a common experience that students with lower scores at the admissions stage sometimes end up with better results at the end of their course than those who had higher entrance scores. It is this experience that raises the question of the reliability of testing procedures.

All of this is not to suggest that the guidelines and their application are unproblematic. For example, the environmental or catchment area factor can be a vague admission criterion. Although the general idea is that it refers to the locality in which an institution is located, the geographical spread of the locality can be problematic. Consider the University of Lagos. What is its environment or catchment area? Some have argued that it should include the adjoining Ogun and Oyo states.

Even where the locality is clear, is the criterion to apply only to candidates who are indigenes of the state or to any student who resides and goes to school in that locality? How is indigeneity to be established? Are we to leave this to the discretion of "gatekeepers" to determine? What happens when the environmental or state quota is not filled: Again, is what should be done in such a situation to be left to the discretion of "gatekeepers"? Should there not be specific guidelines about what should be done in such a situation?

The guidelines also need to spell out how "educationally less developed states" (i.e., disadvantaged states) are to be determined. If this is not to be left to the discretion of "gatekeepers," and therefore left open to arbitrariness or abuse, some objective indices will have to be spelt out and an annual list of such states compiled. The compilation of such a list will provide a basis for monitoring the effectiveness and impact of this type of affirmative action.

As I indicated earlier, the application of affirmative action has generated heated controversy in the country. While its supporters have generally justified it as a desirable agent of even development and national integration, its opponents have pointed to its unfairness. They have also argued that affirmative action encourages and rewards mediocrity. Its effect, it is further claimed, is in the long run likely to be counterproductive of national unity.[24]

The controversy, insofar as it touches on questions of applied ethics, is perhaps best resolved by casuistry. This consequentialist strategy will then not condemn affirmative action a priori. Rather, it will justify or condemn it in the light of its probable or actual consequences.

If, for example, it is claimed that affirmative action policies in Nigeria are not serving an integrative function and that their justification on that ground therefore loses its forces, the situation may be less owing to the policies themselves than to fundamental structural problems and weaknesses in the Nigerian polity. Merely to reject or abandon the policies will not resolve those problems, since the policies are not the cause, but are perhaps policy measures designed to cope with the problems.

Conclusion: Affirmative Action in Nigeria and the United States

I have attempted to explain the relationship between federalism, ethnicity, and affirmative action in Nigeria. My basic argument is that the recourse to affirmative action in Nigeria represents a strategic policy response to contradictions arising out of the ethnically generated demands on the Nigerian federal system during the period covered in this study.

It now remains to add that the formulation and implementation of affirmative action policies in Nigeria should be placed in a comparative context. This suggests that it should be viewed as an alternative political technology for dealing with ethnicity as an aspect of the social structure of federalism in some ethnically heterogeneous polities. The point of such comparisons is partly to indicate whether some culturally determined affirmative action measures adopted in one polity are more effective than others utilized elsewhere for dealing with structurally similar situations. It should also indicate whether such measures, by virtue of their being more effective, can be transposed from one national context to another.

A comparison of affirmative action in Nigeria and the United States should indicate whether considerations relevant to affirmative action in a developing country are also relevant in a developed country. The comparison is all the more worth pursuing because in Nigeria, as in the United States, the genesis of affirmative action arose partly out of ethnic assertiveness by ethnic minorities.

An important factor conditioning the nature of their affirmative action policies is the political histories of both countries, particularly their social and economic histories, and the character of the socioeconomic inequalities that have emerged. With respect to the United States, there is the guilt feeling arising initially out of the social and economic consequences of deliberately and institutionally structured discrimination against various, especially nonwhite, ethnic minorities.

In Nigeria, affirmative action arose partly out of the need to correct certain categories of regional imbalances created by the character of colonial rule and differential ethnic responses to the diffusion of conventional western education. In this respect, the situation is one in which affirmative action is intended to favor a majority ethnic group, the Hausa-Fulani, for example, as a compensation for its historically determined educational disadvantaged position. This is a situation that is not strictly analogous to the United States experience. But affirmative action in Nigeria is also partly designed to cope with and thereby prevent a situation in which the major ethnic groups, the Hausa-Fulani, Yoruba, and Igbo, tended to monopolize access to the distribution and enjoyment of public goods at the expense of minority ethnic groups. In this sense, there is some similarity with the genesis and intention of affirmative action in the United States.

The philosophical basis of constitutional arrangements provides another ground for comparing affirmative action in both countries. This comparison can proceed along two lines: the justification of affirmative action, and, secondly, its theoretical basis. In this way, similarities and dissimilarities in affirmative action between the two countries can be sought at the ideological level.

The justification offered for affirmative action is similar in both countries. It is justified in terms of the need to create a socially integrative polity and therefore stem the divisive and potentially explosive character of ethnically determined socioeconomic inequalities. This is an ex ante justification, put forward as a self-evident one, although it is problematic whether the removal or reduction of interethnic inequalities will of itself remove or reduce interethnic conflict. It is part of the effort to assess the impact of affirmative action in both countries to determine the extent to which it has reduced ethnic conflict.

The theoretical basis of affirmative action in both countries is dissimilar. In the United States, there is substantial debate about whether ethnic groups as such can and should have the kinds of rights conferred upon them by affirmative action measures. Moreover, in the United States, the constituent units were and are not territorially demarcated to coincide with ethnic boundaries. On the other hand, Nigerian federalism, unlike that of the United States, was predicated on a theory of ethnic nationalities, with specific constitutional provisions created to protect the socioeconomic and political rights of ethnic groups. Nigerian states were (are) basically and deliberately created to reflect ethnic composition of the country.

It is in this sense that the theoretical basis of Nigerian federalism is substantively different from that of the United States and very much similar to that of Yugoslavia. This theoretical dissimilarity may explain why there have been landmark cases challenging aspects of affirmative action in the United States, whereas there is yet to be such a constitutional challenge in Nigeria.

However, the same tension between individualist and collectivist or group theories of rights that has characterized the United States debate on affirmative action is also evident in Nigeria. As I have suggested earlier, the debate has tended to highlight weaknesses inherent in the liberal theory of the state--its rejection of group as opposed to individual rights, its subscription to simple majoritarian rule, and its myth of the political marketplace as an open and competitive one for reconciling individual interests.

It is no doubt problematic whether the Nigerian measures discussed here can appropriately be tagged "affirmative action" measures. For example, it can be argued that the measures are strictly speaking not affirmative action ones but are the minimum contractual conditions for maintaining the Nigerian polity as one. On this view, affirmative action is a form of social contract without which the various ethnic groups will not agree to federate. Further illustration of this position is that the phrase "affirmative action" hardly features in Nigerian political discourse.

The comparative problem then is whether the same meaning is given to affirmative action in Nigeria and the United States. However, while the problem of meaning or conceptualization is important, one must avoid imposing conceptual nomenclatures utilized in one polity to describe a set of policy measures on similar sets of policy measures in other polities. One's focus should be less on the nomenclatures than on their conceptual equivalents.

The fact that the very notion of affirmative action is not part of the everyday language of political discourse in Nigeria does not mean absence there of policies which in the United States would be properly designated affirmative action ones. In the Nigerian context, especially since 1979, public policies and measures designed to achieve some of the goals which affirmative action ones in the United States are targeted on have been premised on the "federal character" concept.

Operationally defined, this concept pertains to public policy measures specifically adopted to ensure ethnic balancing in such areas as appointments to public office, admissions to publicly funded educational institutions, the direction of state economic policies, and the provisions of socioeconomic services. In formulation and implementation, and in comparison to affirmative action in the United States, ethnic balancing in Nigeria falls into two of the affirmative action categories identified earlier on in this paper: reverse discrimination and proportional representation.

As for the social contract argument, what needs to be said is that what the dynamics of the political process in the United States has made clear is the need to rethink the rationale for maintaining it as a stable polity. Affirmative action considerations may not have entered into the calculations of the Founding Fathers of the United States, but what is clear now is that such considerations are vital to maintaining the polity and constitute part of the social contract in that country. This much is clear from the political and constitutional history of the country since the 1950s.

There is now a global concern with what Antony D. Smith has described as the "ethnic revival." This refers to the persistence of ethnicity as a salient feature of the contemporary state system. Whether it is in Nigeria, the United States, Yugoslavia, or elsewhere, affirmative action measures are designed as a policy response to the disintegrative potentiality of the heterogeneous ethnic composition of these countries.

NOTES

1. What follows is summarized from Fred M. Frohock, *Public Policy: Scope and Logic*, Englewood Cliffs, N.J.; Prentice-Hall, 1979.

2. David Nicholls, *Three Varieties of Pluralism*, London: The Macmillan Press, Ltd., 1974, p. 61.

3. Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, 2nd edition, 1975; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, New Haven, Connecticut: Yale University Press, 1977.

4. Lijphart, *Democracy in Plural Societies*, pp. 25-44.

5. Donald L. Horowitz, "Patterns of Ethnic Separatism," *Comparative Studies in Society and History*, vol. 23, no. 2, April 1981, p. 175. See also A. H. Birch, "Minority Nationalist Movements and Theories of Political Integration," *World Politics*, vol. 30, no. 3, April 1978, pp. 325-44 (cited in Horowitz).

6. Jean-Jacques Rousseau, *The Social Contract and Discourses*, translated with an introduction by G.D.H. Cole, New York: E. P. Dutton and Co., Inc., 1950, p. 27.

7. B. J. Dudley, "Federalism and the Balance of Political Power in Nigeria," *Journal of Commonwealth Political Studies*, vol. IV, no. 1 (March 1966), p. 20.

8. Lijphart, *Democracy in Plural Societies*, pp. 41-44.

9. Vernon Van Dyke, "The Individual, the State, and Ethnic Communities in Political Theory," *World Politics*, vol. 29, April 1977, p. 344.

10. L. Adele Jinadu, "The Constitutional Situation of the Nigerian States," *Publius: The Journal of Federalism*, 12 (Winter 1982), p. 158.

11. Horowitz, op. cit., pp. 167-68.

12. R. L. Watts, *New Federations: Experiments in the Commonwealth*, London: Oxford University Press, 1966, p. 274.

13. 1960 Constitution, Sections 100-101; 1963 Constitution, Sections 107-108.

14. Alhaji S. Musa, "Nigerian Public Administration Under the Presidential Government System: Development at the Federal Level," paper read at National Conference in 20 years of Nigerian Public Administration, 1960-1980, University of Ife, Nigeria, October 14, 1980.

15. Ibid., p. 16.

16. Ibid., pp. 17-18.

17. Robin Luckham, The Nigerian Military: A Sociological Analysis of Authority and Revolt, 1960-67, London: Cambridge University Press, 1971.

18. On this, see for example, K.W.J. Post, "Modern Education and Politics in Nigeria," in Hans N. Weiler (ed.), Education and Politics in Nigeria, Freiburg im Breisgau: Verlag Romabach and Co., n.d., pp. 139-47.

19. Cf. G. Ramanathan, Educational Planning and National Integration, Bombay: Asia Publishing House, 1965, chap. 3; Frohock, Public Policy, chap. 7, passim.

20. Information gathered from interviews with a number of officials of Federal Ministry of Education, Lagos, May 1982.

21. J. S. Attah, "Federal Character and National Educational Policy," paper presented at seminar, "Federal Character and National Integration," held at the National Institute for Policy and Strategic Studies, July 1-4, 1980, Kuru, p. 10.

22. Benoni Briggs, "Federal Character and Higher Education in Nigeria," paper presented at seminar, "Federal Character and National Integration," Kuru, pp. 9 and 15.

23. The information is abstracted from a recent circular on the subject. I am grateful to the source of the information.

24. For a recent Nigerian debate on the controversy, see the cover story in Times-International, Lagos, Nigeria, vol. 3, no. 35, Monday 17-Sunday, May 23, 1982, pp. 4-8, captioned "Federal Character in Nigerian Politics." For some of the ethical and political aspects of the debate, see also P. O. Bodunrin, "Ethnic Balancing and Social Justice," in mimeo; O. Nnoli, "Cultural Pluralism and Human Rights Education in Nigeria," in L. Adele Jinadu and U. Ivowi (eds.), Human Rights Education in Nigeria, Lagos, Nigeria: Nigeria National Commission for UNESCO, 1982, chap. 6.

AFFIRMATIVE ACTION IN ISRAEL

Natan Lerner

Introduction

The State of Israel is a singular case in the history of nation-making. There are not many similarities between the dramatic, sometimes tragic, process that culminated, on May 14, 1948, in the creation of the sovereign State of Israel, on the one hand, and the many state-building developments that changed the political map of the world in the 19th and 20th centuries, on the other. Likewise, the radical transformation of society in the 34 years of existence of the State of Israel can hardly be compared with the evolution of any other organized nation in modern times.

Israel was conceived, born, and built as a polity committed to a purpose. That purpose, Zionism, aimed at changing the life conditions of the world-scattered community called the Jewish people, or the Jewish nation; it aspired to establish, on the territory on which two millennia ago a Jewish state existed, a modern, independent state, with a Jewish majority, and materialized that aspiration in only half a century of political and practical action; and it envisioned--and relatively achieved --the transformation of the demography and structure of the society existent in the country.

It is against this background that the subject of affirmative action in the State of Israel has to be discussed. The indicated commitment, the policies followed by the state and its agencies in order to serve it, and the factual situation that developed as a consequence of the political, social, cultural, and demographic changes that accompanied, and even preceded, the history of the State of Israel, make it necessary to deal with the subject on several different levels.

The State of Israel contains a multiethnic, multireligious and multicultural population, the majority of which shares the feeling of belonging to a single nation and having a common history, religion, and culture. In that population, however: (a) a large minority considers

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itself profoundly different--in terms of ethnicity, religion, culture, language, and national origin--from the majority, which acknowledges that difference, and (b) within the majority itself, at least two very large edot--ethnic groups, lato sensu--coexist, conscious of a common destiny but in a state of some tension engendered by cultural, social, and economic circumstances that developed, in one of these groups, the sentiment of being discriminated against or, at least, relegated in the distribution of resources and power.

To make the picture even more complex, the majority of the population of the state sees itself as physically threatened and condemned to live in a virtually permanent state of war or siege with its neighbors, almost all of whom do not accept its legitimacy. The ethnic, religious, and cultural ties between the minority within the state--the Arab minority--and those menacing neighbors, perturbate even more the majority-minority relation.

Thus, equality and discrimination, as well as affirmative action and preferential treatment, if applicable, are, in Israel, notions to be examined from a quadruple approach:

1. The status of the Jewish sector of the population, the main object of the preoccupation and care of the founders and builders of the nation, who pursued an outspoken and unmistakable policy intended to promote and facilitate Jewish immigration and its absorption. The positive treatment given to Jewish immigrants was pointed out as an example of affirmative action.

2. The policies of the state, or its majority, vis-à-vis its minorities, specifically the Arab minority, a complex and large group which the majority did not attempt to assimilate and which has never wanted to be desegregated or integrated, although it aspires, naturally, to enjoy equality.

3. The policies of the state as such, or of all or part of the public institutions, vis-à-vis the weaker or disadvantaged part within the Jewish majority, namely, the so-called Oriental communities--the immigrants from Asian and African countries, or their Israeli-born descendants. It is at this third level that a significant discussion

on the subject of affirmative action has been taking place in recent years.

4. As in any other modern society, the possibility or desirability of enacting measures implying affirmative action also has to be considered in conjunction with the status of women in Israel.

It is at these four levels that we shall explore the advocacy or enactment of measures of affirmative action. First, however, the character of the State of Israel, its policies and programs, its constitutional framework and legal orientation, as well as its social structure and demographic composition, will have to be briefly reviewed.

The Policies and Programs of the State

The creation of the State of Israel on May 14, 1948, was the result of the political and practical work of modern Zionism,[1] "the most fundamental revolution in Jewish life," a "quest for self-determination and liberation under the modern conditions of secularization and liberalism."[2] The first Zionist Congress, in 1897, adopted the Basel program, endorsing Theodor Herzl's political conception of Zionism, namely, "to create for the Jewish people a home in Palestine secured by public law."[3]

The World Zionist Organization, a voluntary worldwide movement, would become the main instrument for the implementation of such a program. The Balfour Declaration, issued by the British Foreign Minister in 1917, the Mandate on Palestine, established by the League of Nations in 1922, the Second World War, the holocaust of European Jewry and its aftermath--a tragedy and a trauma the understanding of which is vital to interpreting Zionism--the United Nations General Assembly Resolution 181(II) of November 29, 1947,[4] and the war that followed, are the outstanding stages in the process that culminated in the creation of the State of Israel.

The creation of an internationally recognized Jewish state was the central and basic aspiration of Zionism, but not the only one. The Zionist program, which Theodor Herzl outlined in his book The Jewish State (Der Judenstaat), also includes value elements and social and demographic components. All Zionists, irrespective of trends, want the State of Israel to be a *Jewish* state, namely, a state in which the peculiar nature of Judaism, an inextricable combination of ethnicity, culture, and faith, comes into expression, in symbols--the flag, the anthem, the *menorah*--as well as in legislation, institutions, and immigration and absorption prerogatives.[5] All Zionists also want the Jewish state to be inhabited by an indisputed Jewish majority and to become the homeland of all Jews who aspire or need to come to Israel. The *kibutz galuyot*--the ingathering of the exiles, an aim no less than the creation of the state itself--and *mizug galuyot*--the fusion of the Diasporas, the integration of all Israeli Jews into one single, coherent nation--are the immediate corollaries of that program.

These major aims of the Zionist movement would become a central component in the policies of all Israeli governments, irrespective of the political parties that exercised or shared power in the various periods of Israeli statehood.[6]

Legal Background

The aims of the Zionist movement and of the State of Israel are expressed in the Declaration of Independence of the State of Israel, issued by the Provisional State Council in Tel Aviv on May 14, 1948.[7] This document is of particular importance in view of the fact that, to this very day, Israel, despite early attempts to draft one, has no written Constitution. Owing to the impossibility of reaching an agreement to that effect, the Knesset, the Israeli Parliament, gave up the idea of adopting a Constitution and decided to enact a series of "Basic Laws" intended to become the nucleus of a future fundamental law.[8] As a consequence of this situation, the Knesset enjoys supremacy in the country's legal system.

The Declaration of Independence does not constitute positive law. It has, however, a "special status . . . in . . . Israeli law regarding the question of the basic rights of the citizens . . . and was applied by the Courts as a guide for the interpretation of the laws of the State."[9] The Declaration proclaims, in unambiguous terms, the Jewish character of the state, whatever this means in legal terms.[10] The "Jewish State in

Eretz Israel," it says, will be "open for Jewish immigration and for the ingathering of the exiles." While the gates of the country are, of course, not closed to persons not belonging to the Jewish people, Jews enjoy a privilege, to be articulated later by the Law of Return and other Zionist-inspired legislation on matters concerning immigration and absorption, including automatic citizenship, a privilege not granted to others. The question arises as to whether this advantage is of a discriminatory nature against non-Jews or may be interpreted as an instance of affirmative action or of preferential treatment.

The same Declaration also summarizes, in a single paragraph, what could be described as the political philosophy of the state:

> The State of Israel will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the United Nations.

The relevance of this important paragraph to the treatment of minorities in the state, as well as to all matters concerning the equality of the various sectors of the population, is evident.

The State of Israel, "being a democracy, guarantees the equal rights of all its citizens without distinction as to sex, race or creed. It ensures the enjoyment and exercise, on an equal footing, of human rights and fundamental freedoms in the political, civil, economic, social and cultural fields in the spirit of the Universal Declaration of Human Rights, subject only to restrictions as to the maintenance of public order and morals."[11] While a Basic Law on the Bill of Rights has not yet been passed--and the existent draft has been criticized in legal and political circles--"the maintenance of the dignity of men is axiomatic in the life of the State and, as part thereof, Israel has striven towards the elimination of all distinctions, exclusions, restrictions and preferences founded on race, colour, national origin or sex, which have the purpose of nullifying the equal enjoyment of human rights and fundamental freedoms."[12]

Israel has ratified the United Nations Convention on the Elimination of All Forms of Racial Discrimination, and the Supreme Court of Israel has invoked "the fundamental doctrine of human rights as laid down by the Universal Declaration of Human Rights 1948 and the Covenants on Civil and Political rights, 1966"[13](the latter two have not yet been ratified by Israel).

Equality before the law and prohibition of discrimination are principles embodied in several laws. So, for instance, Section 42 (i) of the Employment Service Law of 1959 prohibits discrimination "against a person on account of his age, sex, religion, ethnic group, country of origin, views or party affiliation, and a person requiring an employee shall not refuse to engage a person for work on account of any of these." Since 1951, there is a Women's Equal Rights Law, and an Equal Opportunity in Employment Law was adopted in 1981. In accordance with Section 9 of the Council for Higher Education Law, 1958, a rule has been enacted prohibiting discrimination with regard to the admission of pupils and the appointment of teachers on ground of race, sex, religion, national origin, or social status.[14] Moreover, the educational system aspires to an "overall socio-national integration of different ethnic communities" and is "designed to serve as a means of benefitting disadvantaged social groups and of upgrading the academic performance of low-achieving students drawn from the same underprivileged groups."[15]

Matters of equality and discrimination have come before the Israeli courts, in connection with religious and conscience freedoms, as well as educational matters. The Israeli Supreme Court, sitting as a High Court of Justice, has the power to deal with matters in which it seems necessary to grant relief in the interests of justice, and which are not within the jurisdiction of any court or tribunal. In this connection, it had been stated that "without the impetus of an equality provision in an enforceable written constitution, the Israeli courts have not shown the same enthusiasm for promoting equality as they have for liberty."[16] The Supreme Court has evidenced reluctance to recognize locus standi to petitioners unable to prove a concrete interest, as well as to intervene in controversial matters of public interest that it considered should remain within the jurisdiction of the political branches of government.[17]

Shapira points out that the judicial handling of the concept of "equality under law has been merely sporadic, piecemeal, and at times surrounded by a misty penumbra of ambiguity. Not that Israeli judges tend to belittle the significance of the precept of equality. . . . One can conjure up many . . . juridical utterances in praise of the idea of equality under the law which, however, in their sum total fall far short of providing a coherent constitutional theory of equality."[18] This may be compensated by the fact that "the traditions of the Israeli government and society have always been directed towards reducing the social and economic gap between individuals and groups. . . . Unlike the American situation, the Israeli government policy directed at achieving equality has left no vacuum into which courts may have been drawn."[19] We shall refer later to the Supreme Court decisions concerning measures in the field of education.

Equality before the law and the existence of judicial remedies do not imply material equality in fact. In this respect, the situation in Israel must be examined against the background of its complicated demographic, social, and cultural reality, including its geopolitical situation. That background and situation are directly pertinent to the subject of the acceptance, or rejection, of principles of affirmative action in some of the areas of tension between different sectors of the population.

Social and Demographic Background

The total population of the State of Israel, as of September 1982, was estimated to be 4,038,000--3,354,000 Jews and 684,000 non-Jews.[20] For its breakdown, we shall use the figures at the end of 1980, based on the census of 1972: 3,921,700 inhabitants, of them 3,282,700 Jews, and 639,000 (16.3 percent) non-Jews.

The main groups in the non-Jewish population were: Muslims, 498,300; Christians, 89,000; Druze and others, 50,700.

Out of the total Jewish population, 1,835,300 (55.9 percent) were born in Israel, and 1,447,000 abroad. Those born in Israel are of the following descent (based on the father): Israel, 459,600 (14.0 percent); Asia, 434,900 (13.2 percent); Africa, 400,200 (12.2 percent), and Europe-America, 540,600 (24.6 percent).

Among the Jews born abroad, 303,400 (9.2 percent) came from Asia, 336,500 (10.3 percent) from Africa, and 807,600 (24.6 percent) from Europe-America.

As to the non-Jewish population, most of the Muslims and Christians are ethnically Arabs, although a significant Christian European community does live permanently in Israel. The Druze constitute a separate religious and community unit. The statistical registration of the population according to religion is a system that already existed under the Turkish and British administrations. It was kept by Israel despite criticism raised against it from different sources.

Immediately before the creation of the state, the area called Palestine contained about 650,000 Jews and 1,300,000 Arabs, 700,000 of whom were in that part of the country that became Israel, about 500,000 in the region occupied by Jordan, and 100,000 in the Gaza Strip. In 1948, when the state was established, the population registered in what had become Israel was 872,000, of whom 716,700 were Jews and 156,000 non-Jews. The majority of Arabs who left Israel became refugees in the Gaza Strip, Jordan, and Lebanon.

The large increase that would take place in the Jewish population was the result of natural causes and immigration. In the first decades of the state, there was an increase of 2,491,600 Jews--46 percent due to natural increase, and 54 percent the net immigration balance. As to the non-Jewish population, there was no significant immigration and the only instance of pronounced increase not based on natural causes was the addition of the East Jerusalem population after 1967. The growth of the Arab population was the result of a high birthrate, a sharp decline in mortality, some immigration, and scarce emigration.[21]

The origins of the Jewish immigrants who settled in the State of Israel in the years of massive immigration would bring about a pronounced change in the cultural and social composition of the general population of the country, and thus are of much relevance to the subject of this paper. Zionism, essentially a European, postemancipation phenomenon, had been active almost exclusively among the so-called Ashkenazi (literally, "German") communities in Europe and America, as well as in the Balkans. In the Oriental (also called Sephardic--literally, "Spanish"--despite differences between subgroups) communities of the Middle East and North Africa, a traditional religious approach to Jewish life prevailed, and Zionism was not too popular. At the time of independence, the Yishuv--the Jewish community in Palestine--contained only a small, noninfluential minority of Jewish inhabitants of Oriental or Sephardic origin. The Ashkenazi majority and its leadership would determine the character of the state and its institutions.

Three decades later, as a consequence of the origins of the mass immigration, the composition of the Jewish population is quite different--more than 55 percent of all Jews were born in Israel and nearly half of the second generation are now of Asian-African origin, or Oriental Jews. Because of the age structure and differential reproduction rates, the proportion of Jewish inhabitants of Asian-African or Oriental origin will doubtless continue to grow, and Israeli-born children of Asian-African descent will soon be the largest ethnic component of Israel's population.[22] The Ashkenazi Jews, a majority within the Jewish people since the 19th century, are becoming a minority in Israel.[23]

While these lines are being written, the country is witnessing a renewed tension both at the level of the relations between Jews and Israeli Arabs and within the Jewish community. The first is mainly related to the general political problem in the area, but some of its aspects are of obvious relevance to the subject to be discussed in this paper. It is the internal Jewish tension that is directly pertinent to the matter of affirmative action and related issues.

Affirmative Action and Today's Israeli Society

For the purposes of these pages, the policies vis-à-vis the population of the territories that came under Israeli administration after 1967 are irrelevant. The question of affirmative action can hardly arise, in practice, in conditions of military administration, irrespective of any solution that might be advanced concerning the future of these areas. Our subject is thus limited to: (a) the national policies serving the Zionist philosophy of all the Israeli governments; (b) the question of Arab-Jewish relations within the so-called Green Line, and (c) intra-Jewish relations, or relations between the Ashkenazi population of Israel and the increasing majority of Oriental Jews. The position of women in society should also be dealt with.

Privileges for Jews: Are They Affirmative Action? The principle that "every Jew has the right to come to this country as an oleh [immigrant]"[24] has inspired the Israeli legislation concerning nationality, as well as the privileges granted to immigrants who come to the country under the Law of Return. As a commentator on the Israel Nationality Law wrote: "Just as the notion of Israel as a Jewish State is inextricably bound up with the return of the Jews to the land of Israel, so Israel's nationality law, as a reflection of the prevailing ideology, cannot be comprehended until this concept of return has been grasped."[25] The World Zionist Organization-Jewish Agency (Status) Law 1952 proclaims (Section 1) the same norm: "The State of Israel regards itself as the creation of the entire Jewish people, and its gates are open in accordance with its laws to every Jew wishing to immigrate to it."[26]

The debate on the nature of the Law of Return and on the philosophical and legal question of "Who is a Jew?"--a debate that has accompanied the State of Israel from the very day of its inception and remains a nightmare for politicians responsible for the stability of Israeli government coalitions--is beyond the scope of this paper.

Abundant and authoritative literature is devoted to it, and the Supreme Court has dealt repeatedly with the matter.[27] What is relevant to our subject is, of course, the question of whether the Law of Return is a discriminatory law, or if it is an example of affirmative action in favor of the Jews who immigrate to Israel. Gouldman, pointing out that the Nationality Law, based on the Law of Return, is open to the charge that it discriminates, on ethnic grounds, in favor of Jews, explains this by the fact "that the Law cannot be divorced from its historic context. It is easier for a Jew to acquire Israeli nationality for the simple reason that Israel is primarily a State for the Jewish people."[28]

Former Jerusalem Law Faculty dean Claude Klein, on his part, considers that the Law of Return is a mesure preferentielle that cannot be considered discriminatory since it does not discriminate against any particular group. He considers the law consistent with the provisions of Article 1.3 of the United Nations Convention on the Elimination of All Forms of Racial Discrimination, and mentions similar measures enacted by the Federal Republic of Germany and the Soviet Union.[29] Former Justice Haim Cohn also denies that the Law of Return can be seen as involving improper discrimination. There is no illegal discrimination when the granting of rights is based on qualities existing in one case and absent in the other.[30]

This is the correct approach. Immigration and nationality laws are an area of legislation belonging to the exclusive domain of each national state. The privileges granted in Israel to Jews concerning immigration and nationality are obviously advantages, since they are not granted to non-Jews. They are not, however, illegal, since they do not impose restrictions on any particular group, race, or religion, and do not close the doors of the country to anybody. Non-Jewish prospective immigrants can be admitted, and obtain Israeli nationality by going through the procedures established by the law to that effect. There are, however, those who consider the Law of Return as "exclusionary" and reject the "legalistic" arguments that disregard the social contexts and consequences of the law.[31]

Accepting the view that the privileges granted to Jews by this legislation are not discriminatory, the question has still to be asked whether policies intended to foster the immigration of one given group fall under the definition of affirmative action. In the particular case of Israel, the wide spectrum of positive measures in favor of Jewish immigrants was considered indispensable to permit the absorption of the newcomers, many of whom were in conditions of great distress, such as the immigrants coming from the DP camps in Europe and the majority of the Orientals. All were exposed to the general cultural and social shock that every immigrant experiences.

The notion of the State of Israel as a Jewish state[32] found expression in some legislative measures of a symbolic or declaratory character, such as the laws on Nazi crimes, and the Martyrs' and Heroes' Commemoration Law. Other laws, also carrying an undisputed Jewish character, have concrete implications from the angle in which we are here interested, and contain provisions involving different treatment between Jews and non-Jews, some likely to fall under the heading of affirmative action or, in the view of others, under that of reverse discrimination. An example is a series of laws inspired by the Law of Return and related to the building process of the state, as already mentioned Laws on the World Zionist Organization and on Nationality, the 1953 Law on the Keren Kayemet Le-Israel,[33] and the 1956 Law on the Keren Hayesod.[34]

The different branches, subsidiaries, and dependent instruments of the Zionist Organization and of the Jewish Agency provide Jewish immigrants--and only Jewish immigrants[35]--with a diversified spectrum of benefits and advantages, including subsidies and loans to come to Israel, housing facilities and mortgages, help in order to obtain employment, temporary accommodation in absorption centers, Hebrew courses and maintenance while taking them, subsidies for school expenses and higher education, and subsidies concerning health insurance and other advantages. These are further complemented by privileges granted by the state relating to tax exemptions, currency facilities, and other benefits involving a preferential status for Jewish immigrants. Most of these advantages are temporary. Tax exemptions, for instance, are granted for the first years in the country and are gradually reduced within that period. Foreign currency benefits are also for given periods.

All these privileges created social tensions and resentment, not only among the Arab minority, but also among Israeli-born or -raised Jews not enjoying similar preferential treatment. In the last decade, the particularly generous benefits granted to immigrants from the Soviet Union have been denounced by spokesmen of groups of African-Asian origin as a manifestation of Ashkenazi bias and protectionism. On the other hand, special social programs have been established by the Jewish Agency in favor of the "disadvantaged strata," "youth in distress," and youth from families "who immigrated from Asia and North Africa."[36]

The Arab Minority. The Arab minority in Israel is not a completely homogeneous group. For the purpose of these pages, however, it is adequate to deal with the Arab minority as a whole, although the differences between Arabs in general and the Druze or the Bedouins have to be kept in mind, and profound differences in the Israeli Arabs' self-perception and their attitude vis-à-vis the State do exist.[37]

The legal status of the Arabs in Israel has been described in clashing terms. According to Smooha,[38] Arabs are "a separate but unequal minority in Israel society," an involuntary nonassimilating minority with a "continued cultural distinctiveness and social separation" determined by numerous institutional arrangements such as the law of separate religious communities, the contiguous concentration of Arabs in a few major geocultural regions, separate localities and neighborhoods, separate schools and media, and the special Departments for Arab Affairs. Lustick considers that the Arabs in Israel enjoy the status of "separate but equal,"[39] and that the objective of the Israeli policies is to "control" the Arab minority, rather than to eliminate, integrate, absorb, or develop it. Stendel, a former deputy adviser on Arab affairs to the prime minister, claims that the principle of equal rights for the Arabs in Israel is well anchored in the general Zionist vision of the character of the Jewish state, and "there can be no doubt about the equality of members of the minority group in the eyes of the law."[40]

It is generally accepted that the individual civil and political rights and the collective cultural rights of the Arabs in Israel are protected. Their right to a separate identity is preserved. They are, however, exempted, or excluded, from compulsory military service, with the benefits and shortcomings involved in this exemption. While this limitation avoids for the Arabs the risk of agonizing loyalty conflicts, it also shows the extent of suspicion that may be behind it.

The standard of living of the Israeli Arabs has risen appreciably; an important middle class and an elite have developed. On the other hand, with the increase of Palestinian nationalism, the Arabs in Israel have become more militant, and recent years have witnessed growing tension between Jews and Arabs, the origin of which is to be found both in the external political situation and the institutional and social limitations that are the consequence of the prevailing conditions.[41]

The Arab aspirations as a minority are not clearly defined. Obviously, part of them aspire to the status of a recognized national minority, able to play a role in national policy-making and to have a decisive say in decisions concerning their own affairs, while achieving total equality in matters of modernization and distribution of resources. Others, however, a minority, advocate greater social integration, although certainly not assimilation. At the other end of the political spectrum, there are those who reject what they call the "Zionist entity" and clearly advocate the liquidation of the State of Israel.

Arabs are not eligible for projects channeled through the Jewish Agency and other Zionist agencies, and are also prevented from receiving benefits reserved for former members of the armed forces. Several committees to consider ways of improving the condition of the Arab minority have been established by the ministries of the Interior, Education, and Culture, the Prime Minister's Office, and the Knesset. Policies regarding the Arabs have certainly become more liberal than in the past, and situations considered discriminatory have been alleviated.

The subject of affirmative action has seldom come into focus in the discussions on the Arab condition in the State of Israel. Complaints have been mainly against discriminatory situations, land expropriations, employment inequality, and inadequate control of the Arabs' cultural and educational life.[42] On a few occasions, however, affirmative action has been included among claims or proposals intended to improve the situation of the Israeli Arabs, and the Histadrut Department for Arab Affairs did recommend measures of affirmative action.[43] Recently, the chairman of the Moslem Committee in Jaffa (the Wakf) put forward a seven-point proposal to that effect, including, among measures in the field of housing, education, employment, and political life, a demand that "affirmative action be applied to Arab candidates for university studies, as is being done for Sephardi candidates."[44] As we shall see later, this particular request is being satisfied liberally in some cases.

In general, special programs of affirmative action for Arabs have not been undertaken, until now, although some schemes, in favor of "underachievers" or to counteract white-collar unemployment among Arabs, have been launched. As explained by an authoritative source: "Israel's policy towards its large Arab minority is based on the concepts of democracy, nationhood, and cultural autonomy; therefore, a complete separate network of education has been developed for the Arab population, and educational services are provided in separate schools, where Arab children are taught in their mother tongue by Arab teachers. The curriculum is the same as that of Jewish schools, but it is adapted to the needs of the Israeli-Arab community and based on its cultural heritage."[45]

As to higher education, an Association for the Development of Arab Education and Culture, based in Nazareth and supported by groups of friends abroad, recently applied to the Council for Higher Education for a permit to establish an Arab University. The request was denied on the ground that no additional university was needed in the country in the next years. The council took note, however, of the difficulties existent for Arab students in the transition from high school to the university and recommended a revision of the conditions of admission of Arab students. The council also recommended that the number of Arab students in the preparatory preuniversity programs be increased considerably, and that the possibility of providing them with complementary studies in the universities and other institutions of higher education be studied.[46]

Ashkenazi and Oriental Jews. As already indicated, the ideology of mizug galuyot, the integration of the exiles, was an essential component of the Zionist enterprise and inspired many of the institutions developed in Mandatory Palestine and later in the State of Israel. The external threats against the existence of Israel also worked to strengthen the feeling of national unity. However, the ethnic, social, and cultural differences among the various immigration waves did not disappear, and tension originating in the grievances advanced by the Oriental sector against the Ashkenazim is today a factor that cannot be ignored.

It has been claimed that the absorption policies applied to the Oriental waves of immigration differed from the patterns followed relating to Ashkenazi immigrants, particularly in matters such as housing, concentration of immigrants in towns or neighborhoods, and employment. Accusations of favoritism and discrimination have been advanced. Whether this is true or not, there is no doubt that Oriental immigrants came handicapped by their lack of technical and professional skills, lower cultural background, deficient sectorial organization, and fewer migratory options than Western immigrants. This would, of course, have its influence on the structure of the new society, engendering tensions between the so-called "first Israel" and "second Israel" and, from time to time, real conflicts, especially when origin, traditions, language, and other variables overlap with seniority in the country, education, income, and place of residence.[47]

While at the primary-school level integration of Jewish ethnic groups in Israel is complete, a considerable gap remains at the secondary school and university levels. In regard to occupation, Jews of European origin are highly overrepresented in the most prestigious occupation categories, while people of Asian-African origin are overrepresented among blue-collar and service workers, with a trend toward the closing of the gap in the administrative category. This, of course, results in a serious income gap. Despite pronounced improvement in the relative standard of living of families of Asian and African origin, they are still in a disadvantaged position compared with the overall average for Jewish families, thus being entitled to "a sense of underrepresentation in obtaining the rewards which the wider society has to offer." This "is undoubtedly a major source of tension,"[48] expressed already in resentment and violence. "Unless a very deliberate and systematic program, with explicit goals and interim evaluation, is adopted in order to counteract the structural trends," in the next decade there may be "even more cause for concern."[49]

The dominating ideological trends within the Zionist movement and the majority of the political parties in Israel have worked against Oriental-Ashkenazi separatism and division. However, there have been attempts to use ethnicity for political purposes, such as, recently, in the 1981 elections and in the verbal incidents following the trial of an Oriental member of the government accused of ordinary offenses. The integrationist ideal of "One people, one language, one culture" is constantly voiced, without major differences in this respect between Ashkenazis and Orientals, or right or left in the political spectrum. All the Israeli governments have proclaimed similar targets in this regard. Even the movements intended to give expression to the feeling of discrimination on the part of the Orientals, such as the organizational attempts that followed the Wadi-Salib riots in 1959, and the Black Panther group in the 1970s, were conducted under integrationist slogans. In the late 70s, however, new Oriental organizations, such as "Ohalim" ("Tents"), the Council of Jerusalem Neighborhoods, "Israel--That's Me," and to some extent, the political party Tradition Movement-Israel ("Tami"), adopted a different line, stressing a separatist Oriental attitude. Some Oriental spokesmen have even put forward the claim for a segregated Oriental economic development, based on an Oriental concentration of manpower and resources.[50]

In general, however, although what some authors call "subcultural" and folkloric variations have always been advocated, Oriental spokesmen have proclaimed support for ethnic integration, ethnic equality, and assimilation within the Jewish sector. The Sephardic and Oriental contributions are frequently stressed, or even overstressed, but there is no defense of separatism. The emphasis has been on rejection of discrimination, greater consideration for the needs of those allegedly discriminated against, compensatory programs, preferential treatment--in sum, measures to improve the condition of the disadvantaged. This brings us now to the debate on affirmative action.

Theoretical Discussion and Proposed Measures

The discussion on affirmative action in Israel is reminiscent of the controversy on the subject that took place, and is currently taking place, in the United States, Great Britain, or Canada. There are, of course, differences related to the distinctive Israeli reality, particularly concerning problems of absorption of the massive immigration that followed the creation of the state, and matters of security. While the existence of inequalities between the Jews and the Arab minority, on the one hand, and between Ashkenazi and Oriental Jews, on the other, has frequently been pointed out, voices calling for programs meriting the name of affirmative action have only recently been heard. In a very early symposium on ethnic problems in Israel, organized in 1951--a year when 175,000 immigrants, about 70 percent of them Oriental Jews, arrived--there was almost no reference at all to programs of affirmative action. Thirty years later (March 11, 1982), the Van Leer Foundation in Jerusalem organized a symposium on the same theme. Included among the speakers were some of the participants in the 1951 discussion. Only one of them now raised, timidly, the question of affirmative action.[51]

In 1959, the Public Inquiry Commission established to investigate the Wadi-Salib riots referred in its report to an "increasing tendency toward affirmative action for special and preferential treatment of Orientals."[52] The army, as we shall see, already began compensatory programs two decades ago, and so did the universities. But, in general, a serious discussion and concrete proposals on affirmative action are a rather recent phenomenon and not too generalized. Even while these pages are being written, at a long symposium on the increased polarization between ethnic groups, organized by a mass-circulation newspaper with the participation of a group of social scientists, mainly of Oriental origin, the subject of affirmative action was completely ignored and the only reference to it was by some opposed to it.[53]

The Subject in the Specialized Literature. On the whole, Israeli social scientists have not argued the case for affirmative action. Eisenstadt, acknowledging, of course, that a significant portion of the poverty-stricken sectors belongs to the Oriental communities, takes the view that the problem of Oriental Jewry and that of poverty are two separate questions.[54] Lissak, analyzing the patterns of protest among the Oriental immigrants, points out the existence of a movement that demands changes in the stratification structure, including "pressure to change the qualifications for senior appointments in the administration, education and in the centers of political power," and "increasing impatience to shorten the way to key positions." In the long run, he believes, demands of this kind "will be completely unnecessary, since the quantity and quality of Oriental candidates for top positions in the administration and in politics will constantly increase, even according to the most pessimistic prognoses."[55]

Iohanan Peres foresees an increase in the claim for equality of opportunities, and advocates "far-reaching steps to promote equality among ethnic groups, even at the price of clashing (temporarily) with the principle of distributing positions on grounds of personal merit. Only the living example of many members of a given ethnic group reaching prestigious and successful positions is likely to provide the groups of Asian and African origin with the feeling that progress can be achieved."[56] Peres notes, however, that the broad opposition to "discrimination in reverse" should not be ignored. In addition to the general arguments of a pragmatic nature against affirmative action, in the case of Israel he finds that it would clash with the need to increase technological standards and preserve the competitive capacity of the state, in order to ensure its defensive capability. Therefore, it might be necessary to maintain selective criteria based on merit, regardless of origin, while developing at the same time compensatory action for members of the Oriental communities in the field of education. Such means would be preacademic courses in the army, the extended school day, broadened frameworks at an early age-level, and similar measures. All of these are examples of preferential support in the formation stages of members of disadvantaged sectors, and are steps already undertaken in Israel.

Smooha advocates the redistribution of resources and opportunities "in order to redress past and present inequities and to avert unrest." He accepts that "non-dominant groups use," among other means, "their identities as legitimate bases for group solidarity," but he does not ignore the shortcomings involved in an automatic approach to preferential treatment: "Ethnic quotas prevent free competition for power. By setting them too low, quotas become benign for the lucky few but work against the majority of Orientals. By confining them to visible, mostly non-executive, appointments, they become no more than token measures." The conspicuous nature of the quotas established in some institutions of higher education and the long-standing Oriental quotas in certain political posts have the consequence of "appeasing the Orientals, concealing the token effect of these measures and inculcating the Ashkenazim with a sense of self-righteousness."[57]

In general, as said, there is little specialized literature dealing with affirmative action in Israel. A very recent volume containing a selection of already published as well as original essays concerned with the themes of migration, ethnicity, and community in Israeli society[58] pays no attention to the subject, except indirectly when mentioning "the beginning of a gradual reformulation of the fundamental ideal of democratic participation," or when arguing that "ethnic equality can be approached only if the deprived progress faster and at the expense of the privileged."[59]

The Jerusalem Law School Discussion. A coherent debate on affirmative action in Israel took place in July 1980 at the Faculty of Law of the Hebrew University of Jerusalem, in the form of a symposium devoted to the memory of a student killed in war.[60] A group of jurists and social scientists, led by the president of the university and the dean of its School of Law, discussed the subject. A detailed proposal was submitted by Dr. Shimon Shetreet, advocating affirmative action in favor of defined groups, such as Oriental Jews, women, socially disadvantaged persons, and large families. The suggestion is to adopt legislation or, at a first stage, a mandatory public policy, based on special training programs for members of the affected groups and on preferential treatment for them, in matters concerning university enrollment, employment, appointments in the public service, and similar situations.

The prohibition of discrimination, now applicable only to governmental institutions, would be extended also to private bodies engaged in public services (education, public health, transportation), in all cases where there is a governmental or public involvement in their activities, such as funding or administration. Those bodies would be expected to undertake training and/or affirmative action programs. They would be under the obligation to collect data showing the relation between the distribution of jobs and positions and the composition of the respective population groups. The burden of proof that no candidates were available among the preferred groups would be on those in charge of the selection. An Authority to Ensure Equality would be in charge of implementing the program and drafting legislation at a later stage. It would have competence to receive complaints, issue certificates giving credit for keeping the relevant standards, or declare that a body is not qualified to contract with the state or receive its support.

The proclaimed aim of the proposal is equality in the result. Its philosophical underpinnings are the "serious mistakes" made in the planning and implementation of the absorption of immigrants from Islamic countries, as well as the wrong cultural approach that harmed the feeling of self-respect and the public image of a large component

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of Jewish society in Israel. Equality in the result would provide moral compensation for past injuries. The proposal rejects the customary arguments concerning lack of identity between victims of past discrimination and those to be affected by the new programs. The psychological element, namely, the importance of the improvement in the public image of all members of the disadvantaged groups, is emphasized. A new distribution of power is likely to help those groups in general terms, in addition to the direct advantages for the immediate beneficiaries. While some social price will have to be paid for enacting programs such as the one proposed, that price will always be much more reasonable than the one to be paid by the perpetuation of the existent inequality.

The discussion during the Jerusalem symposium did not depart considerably from the familiar arguments for and against affirmative action raised elsewhere, except in some respects relating to the particular Israeli reality. Abraham Harman, president of the Hebrew University, pointed out that every immigrant is a disadvantaged person who has to learn a new language, adjust himself to a new climate and to a new social behavior, and is thus in need of special treatment, in fields such as occupation, housing, and language.[61] From an opposite angle, philosopher Yehuda Meltzer rejected most of the grounds on which affirmative action is based, except the argument of self-respect. He minimized the value of affirmative action as a remedy, and advocated more far-reaching measures, such as redistribution of wealth, taxation, and similar techniques. Law professor Steven Goldstein expressed doubts as to the adequacy and justice of affirmative action, which is likely to stigmatize those receiving its benefits, in addition to its other shortcomings.

Professor Eliezer Jaffe, a member of the prime minister's committee that studied the situation of disadvantaged youth in 1972, contributed statistical information contained in that committee's report: 64 percent of school beginners belonged to the Oriental community, but only 32 percent of first-year students in high school were Orientals; at the university level, 12 percent of first-year students were Orientals or their descendants, but only 4 percent of graduates belonged to that group, and only 2 percent of all recipients of doctoral degrees were of Oriental origin. Against such a background, Professor Jaffe argued the case in favor of affirmative action in the education system. He praised the experience of the Jerusalem University School of Social Work, to which we refer elsewhere.

An economist, Professor Yoram Ben-Porat, stated that, in Israel, affirmative action was not relevant to matters of employment, particularly since the differences in remuneration are small, oscillating between 6 and 14 percent of the income in each profession.[62] He opposed positive discrimination in matters of admission to the university, seeing in it a danger for the more qualified among the disadvantaged groups, but strongly supported remedial preuniversity training, such as that provided by the Saltiel Centre referred to later.

A strong case for affirmative action based on pragmatic considerations was finally made by Professor Reuven Yaron, who closed the discussion. Affirmative action is needed, in his view, whenever, as in Israel, there is an explosive situation caused by the overlapping of inequality and ethnic origin.

The Discussion in the Press. The Israeli press deals frequently with intergroup relations. The application of measures of affirmative action was, however, rarely advocated. Recently, in September and October 1981, the subject was discussed in the columns of the prestigious Haaretz, starting with a series of articles by Akiva Eldar under the general heading "Ethnic Discrimination--Image and Reality." The author expressed misgivings concerning the possibility of launching programs of affirmative action in Israel, foreseeing a danger of legal actions on the part of relegated Ashkenazis.[63] He described the particular situation of the different ethnic groups, taking the view that tension is rather confined to the Moroccan subgroup. The absorption and integration of other communities such as Yemenites, Bulgarians, Iraqis, Tunisians, and Algerians has been a considerable success, compared to the Moroccans.[64]

One of the articles, containing an interview with Professor Moshe Lissak, discussed the impact and the use of ethnic tensions in the internal political life of the country, particularly in the last elections, in the summer of 1981. Lissak also compared the trauma experienced by the Oriental immigrants with that, an even sharper one, suffered by the German Jews who came to Israel after Hitler.[65] The attempt to rewrite history, so as to add special emphasis, even quantitatively, to the role of the Oriental communities, was ridiculed by Eldar, who urged the avoidance of stereotypes and ethnic partisanship and an increase of mutual tolerance. At the same time, however, he acknowledged the existence of a feeling of "group injury" among Oriental Jews, even those successful in life.[66]

David Zucker, in a comprehensive article,[67] argued the case for affirmative action, taking issue with Eldar's approach. He denied that intentional discrimination takes place. Israeli society does not put obstacles in the way to success of any person with talent or capacity. The problem is related to the fact that the so-called teunei tipuah ("disadvantaged," "requiring fostering") belong to the Oriental communities, and that only 8 percent of descendants of African and Asian immigrants obtain their bagrut (high school matriculation) certificate, as opposed to 40 percent among the descendants of European and American immigrants. He did not accept the argument that the problem is essentially only of the Moroccans.

A formal equality of opportunities, continued Zucker, is not enough, as the then minister of education Zalman Aranne claimed two decades ago, when he coined the term "State protectionism." In order to close the social gap, "real equality," or "equality in the result," should become the alternative to "equality of opportunities." In Israel, the aim of affirmative action should be to put an end to "the correlation between Oriental origin and heavy representation in the lower echelons of income, low representation in prestigious schools and high representation among disadvantaged sectors and urban area of low status."[68]

There is no reason at all, he added, to claim that an administrative preferential treatment would lower the quality of Israeli society and its way of life. In any case, Israeli society should confront the dilemma between higher standards now, or social solidarity. A dynamic social policy is necessary, in addition to what time and mixed marriages can do. Moreover, time can also work against the interests of society.

The press debate on affirmative action prompted a number of readers to react with sharp letters to the editor, criticizing the proposed program as being "destructive" and its supporters as being politically motivated.[69]

Official Initiatives. Parliamentary action. In 1982, the Knesset established a joint subcommittee of the Committees on Labor and Welfare and Education and Culture in order to study the feelings of alienation among the ethnic communities in Israel. The subcommittee held a number of meetings with the participation of recognized experts in the field of ethnic relations. The whole spectrum of intergroup relations within the Jewish population[70] was reviewed, and some consideration was also given to the subject of affirmative action. Mrs. Shoshana Arbeli-Almoslino M.K. raised the possibility of adopting programs of preferential treatment to correct inequality giving priority to Oriental candidates, if properly qualified. Sociologist Rivka Bar-Yosef referred to the success of the university programs of affirmative action that facilitate the advancement of qualified students on a basis of equality, without implying that a student has been admitted only because he or she belongs to a certain group.[71]

The status of women. The profound social and cultural differences prevailing in such a diversified population as that of Israel, as well as legal problems built into the family law system adopted by the state, are the background against which the subject of affirmative action in connection with the status of women has to be considered. In 1975, the prime minister appointed a Committee on the Status of Women, chaired by Ora Namir M.K., which produced a report, published in 1978, and submitted a wide range of proposals contemplating the needs of women, Jewish or not, in all sectors of life.[72] It included suggestions for the advancement of women. One recommendation was to secure for women 25 percent of "safe" places in the candidates' lists for the Knesset.

Presently, there is an Office of Advisor to the Prime Minister on the status of women. Its head, Dr. Nitza Shapiro-Libai, who chairs an Inter-Ministerial Committee on the Status of Women, dealt explicitly with the matter of affirmative action, adopting the view that "international instruments are all in favor of affirmative action to correct accumulated injustices and accelerate women's integration into all spheres of activities."[73] The Inter-Ministerial Committee, at which the Ministries of Interior, Foreign Affairs, Labor and Welfare, Health, Commerce and Industry, Justice, and Education and Culture are represented, decided in 1980 to urge all governmental departments "to act in favor of equality of opportunities for women in the governmental service and to bring about a better balance in the distribution of jobs between women and men in the service of the State." To that effect, governmental offices should adopt a program including giving "preference to the sex less represented" in certain jobs "during the stage of selection of candidates."

In 1981, Dr. Shapiro-Libai submitted to the Committee on Labor and Welfare of the Knesset a proposal amending the draft Equal Opportunities in Employment Law, suggesting that the law should permit, although not make mandatory, "the adoption of special temporary measures (called in the United States and in England 'affirmative action') in order to achieve more balance in the employment of women." The text read: "Temporary preference granted to one of the sexes in the admission to employment, election for, or admission to, professional training or professional advancement courses, when its purpose is to achieve a better balance in the professional distribution and in the functional level of women and men, will not be considered illegal." The proposed article was not incorporated into the law, adopted in 1981 and in effect since January 1982.

Measures in the field of education. The judiciary's role. Education is seen in Israel as a central factor in the achievement of national goals. The narrowing of the socioeconomic gap and the advancement of Oriental Jews has therefore been considered one of the essential tasks of education since the early days of the state. The Compulsory Education Law of 1949, the 1953 State Education Law, and the "Reform" introduced in 1968 contemplated particularly the needs of the teunei tipuah, with the clear understanding that the immense majority of them were of African and Asian origin. Preschool programs, adult education, psychological and guidance services, special curricula, smaller classes, extra teaching hours, and a longer day, mainly in underprivileged neighborhoods, were intended "to compensate poor youth for deficiencies assumed by the authorities to be inherent in the home and community."[74]

Among the devices conceived at an early stage were graded tuition fees, avoiding leaving back elementary school pupils, facilitating graduation from elementary school to everyone, regardless of performance, and allowing pupils of Afro-Asian origin to be admitted to high school with lower scores. In the 60s, different "fostering" projects, such as the "grouping" system to permit advancement according to individual ability, were enacted, and in 1963, the Center for Disadvantaged Educational Institutions was established. The most ambitious plan was probably the 1968 "Reform," which divided secondary education into two stages, with the intention to better serve the needs of the disadvantaged sectors. To that effect, the selective achievement test governing the transfer from elementary to junior high school was eliminated. The junior high school was supposed to become a period of observation and follow-up. In recent years, secondary education became free at all stages.

The extent to which all these efforts have contributed to closing the gap between Ashkenazi and Oriental youth is the subject of controversy. What an authority called a "positive discrimination policy"[75] seems not to have been enough to eliminate the gap in performance levels between the two major groups. "To the present, the percentage of adolescents entering the academic tier of the educational system . . . remains heavily biased in favour of the Ashkenazi segment of the population. At the other end of the status ladder, Oriental youth are over-represented in vocation programmes and among early school leavers. In training adolescents to fill various positions in the Israeli economy, it would seem that the educational system has assumed an auxiliary function as gate keeper, funneling middle-class Ashkenazi youth towards middle level and elite positions while certifying working-class Oriental youth to join their fathers in blue-collar trades."[76] According to the authors we are quoting, manipulation of the educational system in order to foster a redistribution of resources in society is an ill-conceived enterprise, since the socioeconomic gap remains essentially an economic and political problem. The school fails to close the gap and does not compensate for the disadvantages that many pupils bring from their homes.[77]

Nevertheless, the Ministry of Education continues to adopt separate budgets in order to "advance the weaker sectors of the population," with a view to "a) limiting the educational gap between communities and weak sectors of society, through activities for the advancement of teunei tipuah with an achievement potential; b) enlarging the proportion of members of the Oriental edot and members of weak social sectors among the matriculation recipients; c) developing ways of advancement which should permit teunei tipuah students with an achievement potential to make gradual progress from the early stages in high school to the end of matriculation tests." Family size, housing density, educational levels, and similar criteria determine where to apply these programs.[78]

An interesting and successful program based on tutoring of teunei tipuah by university students, known under the name of Perah, was established jointly by the Ministry of Education, the Jewish Agency, the Students Organization, and all the universities. It serves Arabs (about 100 among 900 beneficiaries) as well as Jews, and the notion of teunei tipuah is based on the Ministry of Education criteria.[79]

It is in the field of education that we can also find some indications of the Israeli judicial approach to problems of equality and the social gap. We have already pointed out that the role of the Israeli courts in these matters has been limited, mainly because of the system of parliamentary supremacy prevailing in the country, as well as the absence of an equality provision in an enforceable written constitution.[80] One of the areas in which the Israeli courts have had opportunities to express themselves is on matters of parental choice regarding residence or geographic qualifications for schooling. In a well-known case, Kramer v. the Municipality of Jerusalem,[81] a group of parents filed a petition in the Supreme Court sitting as a High Court of Justice to have declared invalid the policy of enforcing the 1968 reform, which would imply for their children the need to change schools. The three justices who heard the case rejected the petition, acknowledging the weight of society's interest in a reform expected to produce social integration, as opposed to the rights of the parents.

Justice Etzioni, who was chairman of the committee that investigated the Wadi-Salib riots, justified the special benefits granted by the Ministry of Education to disadvantaged students and the measures intended to enlarge the number of such students in higher institutions. Quoting conclusions of the mentioned committee enumerating the objective factors, not related to personal conditions, that prevent the weaker groups from enjoying equality of educational opportunities, he pointed out that society is entitled to limit basic rights of the citizens for security or for social reasons, as part of "a policy aimed at raising the scholarly and educational level, and at deepening and accelerating the process of social integration of those belonging to different ethnic and social groups."

The Court's approach in Kramer was not an isolated instance. The Supreme Court confirmed it in several more recent cases, also related to the question of society's right to restrict parental freedom of choice.[82] If this orientation is to prevail, one might conclude that it could be made extensive also to cases of affirmative action, if brought before the courts. The obvious question is how far would the Israeli judiciary be inclined to go in their societal approach if programs of affirmative action would affect individual interests. In the present circumstances, when adopted measures are limited and do not clash with such interests, it seems premature to deal with hypothetical situations.

Admission to universities. Israeli universities have developed special preacademic courses for students identified as teunei tipuah or coming from so-called "underprivileged areas" (ezorei metzuka). In general, these programs deserve to be described as affirmative action, avoiding at the same time the controversial issues involved in the establishment of "quotas" and the introduction of elements implying for future graduates the stigma of beneficiaries of differential treatment.

In 1963, the Hebrew University of Jerusalem created the Joseph Saltiel Centre for Pre-Academic Studies[83] with the purpose of enlarging the proportion of members of the Oriental communities and of families in "distress," mainly of Asian and North African origin, in the higher education institutions. In view of the initial success, the scope of the program was widened in 1969 to include demobilized soldiers, members of the non-Jewish minorities, and new immigrants. The criteria for admission are based on the students' economic and social background, their matriculation scores, entry examinations, and a personal interview. The economic and social background is determined by elements such as size of the family, income per capita, education of the parents, area of residence, schools attended, country of origin (also of the parents), and housing conditions. The center provides tutoring and controls the students' performances. After completing the program at the center, students apply for admission to regular studies solely on their merits.

Since 1978, the School of Social Work of the Hebrew University has undertaken a successful scheme. It reserves 20 places, among 120, for "opportunity needed" students. Such students score below the required marks but are considered eligible if they are adequately motivated and respond to the Ministry of Education's definition of teunei tipuah. Up to now, the three-year project has involved 70 students, 20 of them Arabs (the general figure of Arab students in the School of Social Work is about 8 percent). Tutors, maintenance subsidies, and scholarships for the selected students are provided by interested factors. While there are no final results as yet, the provisional conclusions are highly satisfactory: there is virtually no difference in the performance of the selected and tutored students as compared with the regular ones, and the gap between both groups has declined steadily after each stage of the program.[84]

Tel Aviv University--which a few years ago abolished a system that secured a given number of places for Arab students, after it was felt that it was not needed anymore--has established a preparatory program for students from "underprivileged areas."[85] The determination of such "underprivileged areas" is based on socioeconomic considerations that clearly overlap membership in the Oriental sector of the Jewish population. The program is open for Jewish as well as Arab students. The students undergo a psychometric test and are admitted provided that, despite their insufficient marks, they show reasonable possibilities of success. Experience proves that 80 percent of those passing the preparatory program successfully have the same chance of success at the university as students entering normally.

It is expected that in 1982, up to 300 students will have passed through this program. No difference at all is regarded as existent between those completing the program and those admitted to the university on the basis of a normal bagrut certificate. The schools or departments considered more selective or difficult (e.g., engineering, law, medicine) are expected to admit "underprivileged areas" students who are below the minimum standard but close to it, the respective numbers to be decided by the Admissions Committee of each school or department. The respective departments will follow the achievements of each of these students in their first year of studies. In order to compensate the alleged disadvantages of students from "underprivileged areas" with regard to the contents of the psychometric test,[86] special guidance will be given in advance.

Haifa University established a Unit to Bridge the Gaps, supported by the World Sephardic Federation and the Department for Sephardic Communities of the Jewish Agency. Its aim is to close the social gaps by stimulating higher education for residents of the so-called development towns and distressed neighborhoods in the major cities. The activities of the unit include participation in a program initiated in 1974 for the advancement of local leadership through university education.[87] Among the projects of the unit, several relate to the study and promotion of the cultural tradition of the Oriental communities.

The army programs. From its very inception, the Israeli Defence Forces (IDF) worked for the integration of all parts of the population. A faithful reflection of the majority of society (as explained, most Arabs do not serve in the army), the IDF enjoys the advantages of its general prestige, and its role in the life of the country goes far beyond its purely military aim. During the long period of military service--three years for men and two for women--in addition to yearly reserve duty, the Army has, and uses, the possibility of molding the character of a soldier in many ways. In the field of education, the Army organizes courses in Hebrew, compulsory courses to complete elementary education, and optional secondary education.[88]

An important program, particularly relevant to our subject, is the Center for the Advancement of Special Populations (Makam, in the Hebrew acronym). In the past seven years, this center has developed a number of forced-pace remedial programs in favor of draftees with less than a complete elementary education or with other problems, including a criminal past. The program implies a "painstaking approach to every individual soldier, through extended basic training, vocational training and initial supervision in the unit to which he is eventually posted."[89] It includes home visits, search for candidates at the induction center, use of special soldier-teachers, permanent follow-up and cooperation with the Ministry of Labor and specialized educational institutions, with a view to providing the soldier with a concrete trade. At least on the vocation and motivation levels, the Makam program seems to have achieved considerable success.

General Raphael Eytan, chief of staff of the IDF, defined the aim of this program as "the maximum advancement of each soldier belonging to the weaker populations, with due consideration to the needs of the Army and to the needs of society as a whole."[90] The term "weaker populations" is interpreted by Roumani as corresponding in its immense majority to Orientals.[91]

Another relevant program developed by the IDF is the university-preparatory course designed primarily "for Orientals with matriculation certificates who have not obtained the minimum grade required for the competitive university examinations." Oriental youths are accepted for the IDF's premilitary vocational training schools even if they have not completed the general requirements.[92]

While undoubtedly the IDF upgrades the Oriental sector, Roumani considers that it does so by only one level, and therefore does not bridge the gap.[93] The army "contributes more to the Oriental's over-representation in the 'construction, industry and trade' category than to his entrance into the 'liberal professions, bureaucracy and business.'" The university-preparatory program does prepare Orientals for the competitive entrance examinations and increases their chances of graduating. Roumani concludes that in order to permit a greater number of Orientals to compete with Ashkenazis as equals, "discrimination in favor of Orientals is essential not only to arrest the gap but also to accelerate the pace of national integration."[94]

Project Renewal. Project Renewal, announced by the prime minister of Israel in 1977, was conceived as a program intended to improve the situation of 69 "distressed" neighborhoods in Israel, with the close participation of Jewish communal institutions all over the world. The project,[95] jointly managed by the government and the Jewish Agency, with the cooperation of local residents and communities, includes a diverse range of activities, special training and education of residents of the involved neighborhoods, vocational training for youth, after-school activities, self-help programs, day-care centers, health services, employment, housing, cooperation with the Unit to Bridge the Gaps of Haifa University, etc.

The relevance of this ambitious program to the problem of the social gap within Israel, and to the different initiatives that might fall under the heading of affirmative action, cannot be denied. On the other hand, it is still too early to judge the results of Project Renewal, the object of an ongoing controversy in the Israeli media.

Large families. The overlap between ethnic background and size of family has been frequently pointed out by observers of Israeli society. Measures in favor of large families have been advocated and enacted. There is a proposal for a Large Families Law aimed at "anchoring in law, under one statutory roof, all the benefits and rights of large families in the areas of housing, income-maintenance, education, leisure-time, and use of public utilities."[96]

De Facto Preference in Politics. A description of measures undertaken in order to improve the position of Oriental Jews in different areas would be incomplete without a reference to the situation prevailing in the political parties, an almost exclusive source of power in Israeli public life. There is no room, in this respect, to speak about a coherent or formally agreed policy. Most parties, particularly in the light of the experiences of 1977 and 1981, have shown great sensitivity regarding the claims of discrimination on the part of Oriental Jews. Both major parties, for instance, advanced to the second spot on their lists candidates belonging to the Oriental sector. It is accepted that, for years, a more or less stable proportion of places in the lists of candidates--about 30 percent--has been reserved for Orientals, implying a sort of informal quota.[97]

One of the arguments in favor of changing the electoral system in Israel is that the adoption of regional representation would increase the share of qualified Oriental spokesmen and would widen the involvement of the Oriental communities in political life.[98] In any case, readiness to give adequate expression to the ethnic element in the electoral efforts of all groups is an important factor in Israel today. Concerning the Arab sector, the situation is different due to reasons pointed out before.

Relevant to this subject are the resolutions adopted by the Committees on Education and Social Equality of the Labor Party, at the 1981 National Convention, favoring the enactment of programs of affirmative action.

Conclusions

The State of Israel is entering its 35th year of life. It is a state whose existence is threatened from the outside by those who do not recognize the legitimacy of its raison d'etre, namely, the fulfillment of the Zionist program through the establishment of a Jewish state. This program involves (1) a promotional state policy in favor of Jewish immigration and advantages for those immigrants; (2) a particular and delicate situation for the nonassimilable Arab minority within Israel.

The Jewish majority, while strongly united by historical, religious, and cultural elements, as well as by the external dangers, is confronting internal tensions, engendered by a profound change that took place in its demographic structure in the years that followed the creation of the state. A major element in that tension is the feeling existent among the Oriental sector of the population that it has been the victim of injustice in the process of absorption and integration and is therefore entitled to compensatory measures. While the conviction of being one nation and the desire for integration are virtually common to all Israeli Jews, members of the Oriental community are demanding special treatment to gain material equality, and steps intended to strengthen its differentiation and its self-assertion.

Against this background, a discussion on affirmative action is now taking place. It is mainly related to the area of Ashkenazi-Oriental tensions and only in a limited way to the Arab minority. Although the subject was mentioned as early as the 50s, it is only in the last years that the debate has become significant, involving universities, the specialized literature and the press, and, to a lesser extent, the parliament and governmental agencies.

Those justifying programs of affirmative action invoke, in essence, the same arguments used in other parts of the world, and so do those opposed to them. Differences characterizing the particular Israeli situation have been stressed, however, by advocates of both views. Orientals are certainly not a minority in Israel; Arabs are not a minority whose situation can be compared, for instance, to that of the Hispanics or blacks in the United States. Security is an element of utmost importance in Israel, nonexistent elsewhere. Immigration plays a role in Israel not comparable to other countries. Hence, the singularity of the Israeli experience.

It is in the framework of that experience that some measures have been proposed, and some steps taken. Unlike in the United States, the matter has been kept at a low profile in Israel. It certainly has not achieved a public impact similar to that of the well-known judicial decisions in the United States. A major area where policies of affirmative action were enacted was, according to some views, the special benefits for Jewish immigrants, in accordance with the aims that brought into existence the State of Israel. Except indirectly, the subject has almost not been related to the field of employment. In questions of education, a diversified range of compensatory measures in favor of teunei tipuah, "disadvantaged" students coming from ezorei metzuka, "underprivileged areas," has been adopted. A policy of affirmative action is being applied in the universities, for Jews and Arabs, but "quotas" have not been established. There have been concrete proposals concerning the status of women. The Army is implementing a program in favor of the weaker sectors, which overlap the Oriental population.

Intergroup tensions are a serious problem in Israel. But in view of the developments, in the Arab sector as well as in relation to the Jewish population of Oriental origin, one is inclined not to overstate the role of measures of affirmative action as a major component in future policies. Such measures can, however, be one possible way of solving difficulties and, certainly, become constructive steps toward the amelioration of the situation of sectors in distress and an important psychological factor in the promotion of feelings of self-respect and dignity among those considering themselves, rightly or wrongly, the victims of injustice or discrimination.

NOTES

1. The term "Zionism" originated in the word "Zion," which became a synonym for Jerusalem, expressing the "yearning of the Jewish people for its homeland," Eretz Israel or Palestine. Since the 1890s, it is used as denoting the purpose of modern political Zionism. Cf. Encyclopaedia Judaica, vol. 16, Jerusalem, Keter Publishing House Ltd., 1973, p. 1032 and fol. For a history of the Zionist movement see, i.a., Walter Lacqueur, A History of Zionism, London, Weidenfeld and Nicolson, 1972.

2. Shlomo Avineri, "Zionism as a National Liberation Movement," The Jerusalem Quarterly, 10, Winter 1979, pp. 143-44.

3. For its text, The Arab-Israeli Conflict, ed. John Norton Moore, vol. III, Princeton, Princeton University Press, 1974, p. 3.

4. For all the mentioned texts, op. cit., pp. 31-32, 74-83, and 313-38, respectively.

5. See Ernest Stock, "Israel--A Jewish Polity with a Multi-Ethnic Population," Patterns of Prejudice, London, vol. 15, no. 4, 1981, pp. 34-41. For this author, more than intrinsic Jewishness, what exists in Israel is a "more or less palpable Jewish influence" in institutions expressing sovereignty, such as the courts, the Army, or the educational system.

6. Compare, in this respect, the Basic Principles of the present Israeli government with those of the last Labor-led coalition, Israel Government Yearbooks, Jerusalem, Center of Information, 1980/81 and 1976, respectively.

7. For its text in English, Facts about Israel, Ministry of Information, Jerusalem, 1975, pp. 42-43.

8. For the constitutional debate, the legal value of the Declaration and, in general, Israel's constitutional system, see, i. a., Amnon Rubinstein, Hamishpat Hakonstitutzioni shel Medinat Israel (The Constitutional Law of the State of Israel), 2nd edition, Tel Aviv, Schocken Publishing House Ltd., 1974, particularly pp. 16-30.

9. Report submitted by the government of Israel, on March 3, 1981, to the Committee on the Elimination of Racial Discrimination (CERD), UN document CERD/C/61/Add.1/Rev.1, p. 3. Cfr., i.a., Ziv. v. Gubernik (1948), 1 Piskei Din (P.D.--Reports of the Israeli Supreme Court) 85, 89; Kol Ha'am Co. Ltd. v. Minister of the Interior (1953), 7.P.D., 871.

10. Cfr. Claude Klein, Le Caractere Juif de l'Etat d'Israel, Paris, Cujas, 1977, p. 14.

11. See report mentioned in note 9, pp. 3-4.

12. Ibid., p. 5.

13. Cfr. American European Beth-El Mission v. Minister of Social Welfare (1967), 21 (ii) P.D., 325-33.

14. Report mentioned in note 9, p. 36.

15. Amos Shapira, "Educational Liberty and Equality," in Law and Equality in Education, ed. Stephen Goldstein, Jerusalem, The Van Leer Jerusalem Foundation, 1980, p. 149. This volume contains adaptations of papers presented at a three-day workshop on education, equality, and the law held in Jerusalem in 1977, focusing on problems of students from disadvantaged backgrounds and on ethnic-origin group integration within the Jewish sector of the school population.

16. Stephen Goldstein, "Judicial Intervention in Education Decision Making," op. cit., p. 100.

17. Cfr. Supreme Court judgment 448/81, Ressler v. Ministry of Defense. See also Zeev Segal, "The Right to Be Heard by the High Court of Justice," Haaretz, Tel Aviv, April 12, 1982.

18. Shapira, loc. cit., pp. 153-54.

19. Goldstein, loc. cit.

20. Cfr. Yedioth Aharonot, Tel Aviv, September 20, 1982. For the breakdown of the statistical information, Statistical Abstract of Israel 1981, Central Bureau of Statistics, Jerusalem, 1981. See also Central Bureau of Statistics, Society in Israel, 1980, Statistical Highlights, Jerusalem, 1980. All the figures as of 1969 include the population of East Jerusalem.

21. Cfr. Jacob M. Landau, The Arabs in Israel, London, Oxford University Press, 1969, pp. 3-4.

22. Cfr. Judith Bernstein and Aaron Antonovsky, "The Integration of Ethnic Groups in Israel," Jewish Journal of Sociology, London, vol. XXIII, no. 1, June 1981, p. 9.

23. On the ethnic structure of Israel, Iohanan Peres, Iahasei Edot b'Israel (Ethnic Relations in Israel), Tel Aviv, Sifriat Poalim, 1976, especially pp. 42-76.

24. Section 1 of the Law of Return. For its text, as amended, Laws of the State of Israel (L.S.I.), Jerusalem, the Government Printer, vol. 4, p. 114, vol. 8, p. 144, and vol. 24, p. 28. The authorized English text uses the term oleh. As indicated by the translators, "aliya means

immigration of Jews, and oleh (plural: olim) means a Jew immigrating into Israel." Literally, aliya means "ascension," stressing the centrality that Zionist ideology attaches to Jewish immigration to Israel.

25. M. D. Gouldman, Israel Nationality Law, Jerusalem, the Hebrew University of Jerusalem, Faculty of Law, Institute for Legislative Research and Comparative Law, 1970, p. 9. For the Law on Nationality and its amendments, L.S.I., vol. 6, p. 50, vol. 12, p. 99, and vol. 22, p. 241.

26. For this law and its amendment, L.S.I., vol. 7, p. 3, and vol. 30, p. 43.

27. See, i.a., Amnon Rubinstein, op. cit., and his article "Israel Nationality," Tel Aviv University Studies in Law, 2, 1976; Gouldman, op. cit.; Klein, op. cit.; Haim H. Cohn, "Hok Hashvut" ("The Law of Return"), Gesher, Jerusalem, 72-73, 1972, pp. 96-117. B. Akzin, "Who Is a Jew: A Hard Case," Israel Law Review, Jerusalem, 5,2, 1970, pp. 259-63, and many others. Also, well-known Supreme Court decisions in Rufeisen v. Minister of the Interior (1962), 16 P.D. 428, and Shalit v. Minister of the Interior (1969), 23 (ii) P.D. 477.

28. Op. cit., p. 67.

29. Klein, op. cit., pp. 33-36. On affirmative action in the Convention, Natan Lerner, The U.N. Convention on the Elimination of All Forms of Racial Discrimination, Alphan aan den Rijn, Sijthoff & Noordhoff, 1980, pp. 32-33 and 39.

30. Op. cit., p. 99.

31. Cfr. Sammy Smooha, Israel, Pluralism and Conflict, Berkeley, University of California Press, 1978, p. 197.

32. On this notion, as accepted by Israeli courts, see Yeridor v. Central Electoral Committee (1965), 15 (iii) P.D. 365. It is beyond the scope of this paper to deal with the role of Jewish religious law in the legal system of Israel and, in general, the recognition given in Israeli law to the different legal systems applicable in matters of personal status and religious communities. See, on this matter, i.a., Izhak Englard, Religious Law in the Israel Legal System, Jerusalem, Hebrew University of Jerusalem, Faculty of Law, Harry Sacher Institute for Legislative Research and Comparative Law, 1975; Amnon Rubinstein, "Law and Religion in Israel," Israel Law Review, 1967, vol. 2, no. 3, pp. 380-414; S. Zalman Abramov, Perpetual Dilemma, Jewish Religion in the Jewish State Law, Rutherford, Fairleigh Dickinson University Press, 1976.

33. L.S.I., vol. 8, p. 35.

34. L.S.I., vol. 10, p. 24.

35. The rights of an immigrant are also granted to spouses and descendants who are not considered Jewish in the terms of the Laws of Return and Nationality.

36. See the Jewish Agency for Israel, Proposed Budget for the Year 1981/2, Jerusalem, a source of concrete information on the activities of the organization.

37. See conclusion of studies on the Arab minority in Israel conducted by Sammy Smooha (Maariv, Tel Aviv, April 6, 1982) and Shmuel Toledano (The Jerusalem Post, May 14, 1982).

38. Op. cit., at note 31, pp. 262-63. By the same author, "Existing and Alternative Policy Towards the Arabs in Israel," Ethnic and Racial Studies, London, vol. 5, no. 1, January 1982, pp. 71-98.

39. Ian Lustick, Arabs in the Jewish State--Israel's Control of a National Minority, Texas, University of Texas Press, 1980, pp. 8 and 64.

40. Ori Stendel, The Minorities in Israel, Jerusalem, Israel Economist, 1973, pp. 184-86.

41. For a militant anti-Zionist presentation of the Arab case, see Sabri Jiryis, The Arabs in Israel, translated by Inea Bushnaq, New York, Monthly Review Press, 1976. The first edition of the book appeared in Hebrew in 1966.

42. See for instance the contributions of Arab spokesmen to Echad mikol shisha israelim (One Out of Every Six Israelis), a symposium on relations between the Jewish majority and the Arab minority in Israel, ed. Alouph Hareven, the Van Leer Jerusalem Foundation, 1981, pp. 194-97 (in Hebrew). The emphasis by all of them is on nondiscrimination.

43. Lustick, op. cit., p. 261.

44. "Jews and Arabs in Israel," New Outlook, Tel Aviv, March 1982, p. 41.

45. Immanuel Koplewitz, Arab Education in Israel in 1981, A Brief Survey, May 1981. We are grateful to Mr. Koplewitz, head of the Department of Arab Education of the Ministry of Education and Culture, for his clarifications in a personal interview.

46. Haaretz, February 5, 1982. Also, Atallah Mansour, "The University Dream of the Arabs of Galilee," Haaretz, March 3, 1982.

47. Cfr. Peres, op. cit., p. 77 and fol.; Moshe Hartman and Hanna Eilon, "Ethnicity and Stratification in Israel," Megamot, Behavioural Sciences Quarterly, Jerusalem, vol. 21, no. 2, February 1975, pp. 124-39.

48. Bernstein and Antonovsky, op. cit. p. 20.

49. Ibid., pp. 22-23.

50. See David Hamu, "For an Oriental Collective," Haaretz, October 14, 1981; Shlomo Swirski, Orientals and Ashkenazim in Israel--The Ethnic Division of Labor, Haifa, Machberot Lemechkar Ulebikoret, 1981, particularly pp. 333 and fol. On the protest movements, Deborah Bernstein, "Conflict and Protest in Israeli Society--The Case of the Black Panthers of Israel," Megamot, vol. XXV, no. 1, September 1979, pp. 65-80.

51. Cfr. Megamot, vol. II, no. 3, April 1951, p. 261 and fol. and 277 and fol., and vol. III, no. 4, July 1952, p. 319 and fol., and Tom Segev, "The Cake That Was Not Baked," Haaretz magazine, March 19, 1982.

52. See Smooha, op. cit., p. 373, note 22.

53. Maariv, April 27, 1982, pp. 35-37.

54. Shmuel N. Eisenstadt, Shinui v'hemschechiut bachevrah haisraelit (Change and Continuity in Israel Society), Jerusalem, the Jerusalem Van Leer Foundation, 1974, p. 29. See, by the same author, Israeli Society, London, Weidenfeld and Nicolson, 1967. Also, Integration and Development in Israel, ed. by S. N. Eisenstadt, Rivkah Bar Yosef, Chaim Adler, Jerusalem, Israel Universities Press, 1970.

55. Moshe Lissak, Social Mobility in Israel Society, translated by Batya Stein, Jerusalem, Israel University Press, 1969, p. 111.

56. Op. cit., particularly pp. 193-94.

57. Op. cit., pp. 256-57 and 193-95.

58. Studies of Israeli Society, ed. Ernest Krausz, New Brunswick, Transaction Books, 1980.

59. Op. cit., Erik Cohen, "The Black Panthers and Israeli Society," p. 161, and Sammy Smooha and Yochanan Peres, "The Dynamics of Ethnic Inequalities: The Case of Israel," p. 180.

60. I am obliged to Dr. Shimon Shetreet for giving me access to the recorded, although not edited, proceedings of the symposium. For a short summary on the discussion, Amos Ben-Vered, "Positive Preference--and Equal Opportunity." Haaretz, July 25, 1980.

61. All references are from the above-mentioned unedited proceedings.

62. The gap seems to be increasing, as recently pointed out in the Knesset on the basis of the last findings of the Central Bureau of Statistics. See The Jerusalem Post, May 7, 1982.

63. For the series, Haaretz, September 11, 13, 14, 15, 17, 18, 20, 22, and 23. For reactions to Eldar's articles, i.a., Dr. Shimon Shetreet, "Dear Akiva," September 30; David Hamu, "For an Oriental Collective," and David Zucker, "On Equality of Opportunities and Positive Preference," October 14, all in Haaretz. All articles are, of course, in Hebrew. We give the titles in English translation.

64. Professor S. N. Eisenstadt, interviewed by Eldar (September 14, 1981), points out that immigration waves like the Bulgarian and Yemenites were of consolidated communities including their leadership and intellectuals, with self-helping institutions.

65. September 15, 1982.

66. September 17 and 23, 1982.

67. Loc. cit.

68. Ibid.

69. See, i.a., letters from Professor Haim Adler, of the Hebrew University, Dr. Shmuel Goldschmidt, of Tel Aviv University, and Mr. Yair Goren, all of them in Haaretz, March 9 and 11, 1982.

70. Although the committee has an Arab member, its terms of reference cover only the Jewish population and do not include the Jewish-Arab area.

71. See meeting on March 19, 1982. I am thankful to the chairman of the subcommittee, Mr. Mordechai Ben-Porat M.K., for opening to me the minutes of the subcommitteee. See also The Jerusalem Post, March 21, 1982.

72. Prime Minister's Office, Proposals of the Committee on the Status of Women, Jerusalem, 1978. For legislation in effect, 1951 Women's Equal Rights Law, 5. L.S.I., 171-72; 1981 Equal Opportunities in Employment Law, Hebrew text in Sefer Hahukim 1026, Jerusalem, p. 285.

73. Nitza Shapiro-Libai, "The Concept of Sex Equality--The UN Decade for Women," Israel Yearbook on Human Rights, Tel Aviv, 11, 1981, p. 132. The author points out that "separate or protective treatment which is based on gender rather than on function or merit" is unwarranted by those international instruments.

74. Arnold Lewis, "Educational Policy and Social Inequality in Israel," The Jerusalem Quarterly, 12, 1979, p. 107. On educational policies in Israel, also Chaim Adler, "The Israeli School as a Selective Institution," in Integration and Development in Israel" (see note 54), pp. 287-301.

75. Avraham Minkovich, "An Evaluation Study of Elementary Education in Israel," in Law and Equality in Education (note 15), p. 22.

76. Lewis, op. cit., p. 108. See also Shimon Reshef, "National Aims and Educational Policy," The Jerusalem Quarterly, 20, 1981, pp. 96-104.

77. Minkovich, op. cit., p. 8.

78. Cfr. Israel Government Year Book 5741 (1980/81), pp. 196-97.

79. See Perah, periodical bulletin, Jerusalem, 1982.

80. Cfr. Goldstein, op. cit., pp. 95 and 100.

81. 25(I)P.D.767 (1971).

82. Such, Shaul v. the City of Jerusalem 29 (II) P.D. 804 (1975); Nir v. Local Council of Beer Yaacov,32 (II) P.D.253 (1978); Ramat Raziel v. Regional Governmental School Harei Yehuda, 31 (III)P.D. 794 (1977); and Kosolovsky v. Regional Council of Eshkol, 30 (II) P.D. 449 (1976). In the last-mentioned case, Justice Baisky's reasoning follows the line adopted by Justice Etzioni in Kramer.

83. For the center, see The Centre's Yearbook, Jerusalem, 1979/80 (in Hebrew), Only through Education, Jerusalem, 1981, a brochure on the center, in English, and Information for Candidates to the Centre, Jerusalem, 1982 (in Hebrew).

84. See report by Menahem Birenboim, the Hebrew University of Jerusalem, School of Social Work Paul Baerwald, December 1981. Also, intervention of Professor Eliezer Jaffe in the Jerusalem Law School Symposium, note 60.

85. Interview with Professor Elazar Kochva, of the Faculty of Life Sciences, chairman of the Admission Committee of Tel Aviv University and of the Inter-University Committee on bagrut certificates.

86. It is claimed that the test was designed following criteria adequate to the Western components of the Israeli population.

87. This program benefits about 2,000 students of all the Israeli universities. For information on the unit, see Haifa University, The Unit to Bridge the Gaps. June 1981.

88. See Maurice M. Roumani, From Immigrant to Citizen, Foundation for the Study of Plural Societies, The Hague, 1979.

89. See Josef Goell, "Basic Training," The Jerusalem Post magazine, February 1982; also, Etgar, daf lamefaked, a monthly publication of the center, initiated in May 1980.

90. Etgar, May 1980, p. 1.

91. Op. cit., p. 39. It should be noted that, in general, the army avoids establishing separate units for recruits with low socioeconomic backgrounds.

92. Ibid., pp. 60-63.

93. Ibid., p. 86.

94. Ibid., pp. 125-27.

95. For the involvement of different state agencies in the project, Israel Government Year Book 5741 (1980/81), pp. 138 and 197, i.a.

96. Eliezer D. Jaffe, "ZAHAVI: Anatomy of a Grass-Roots Organization," Midstream, New York, January 1982, p. 33.

97. Cf., i.a., Hayim Handwerker, "The Ethnic Horse," Haaretz magazine, February 2, 1982.

98. Haaretz, March 3, 1982.

INTERNAL COLONIALISM AND POLITICAL ENGINEERING IN THE SUDAN

Dunstan M. Wai

I. Introduction

The Sudan is a typical embodiment of all the identifiable characteristics of developing societies: in its complex ecological contrasts, in its multiracial and multiethnic groupings, in its variety of systems of life, in its intense and yet empty ideological associations, in its rich natural resources and yet with rampant, naked poverty, in its lack of a dynamic, focused, and visionary leadership, in the absence of institutionalized polity and in its high index of political instability. But the most fundamental problem facing the modern Sudanese state since its creation is the African-Arab schism. This conflictual cleavage has more often than not shaped political discourse and alliances between powerful ruling cliques.

In this essay, we shall not focus on the sources and intensity of the African-Arab conflict in the Sudan.[1] Of relevancy to us here are the specific policy priorities designed to respond to the dichotomous duality of the Sudan as reflected in the social, racial, cultural, and religious differences, and economic disparities between the North and South. We shall examine the Addis Ababa Peace Accord as an institutional conflict regulatory mechanism. This analysis will be preceded by a brief overview of the social, economic, and political environment.

II. Social, Economic, and Political Environment

The Sudan is the largest territorial unit in the continent of Africa, covering a total area of approximately 1 million square miles. Within this huge area, there are extreme variations in climate, soil, vegetation, as well as in ways of life. Aside from the complex ecological contrasts, the Sudan can conveniently be divided into two geographical zones: desert in the North and tropical savanna grassland in the

South. The country lacks an integrated transportation and communication network, making travel difficult, thereby compounding problems of governmental penetration. Racial, ethnic, cultural, and religious cleavages characterize power contests, and constitute some of the salient factors that account for much political instability in that part of Africa. The country has two distinct peoples with differing value systems: the Arab and Arabized Sudanese in the North, and the Nilotic, Nilo-Hamitic, Bantu (Sudanic) Sudanese of the South.[2]

Although Northern Sudan is made up of several ethnic groups with various modes of social and economic systems, the people are unified by the Islamic religion and the Arabic language into a distinctive Arab culture and identity. Islam in the Northern Sudan, as in all Moslem communities, is more than a religion. It is a complete way of life. It regulates every aspect of a Muslim's life by insisting on adherence to the five pillars of faith: witness, prayer, fasting, charity, and pilgrimage to Mecca; and, besides this, it provides for the governance of every Muslim community. After centuries of peaceful as well as aggressive Arab contact and infiltration across the Red Sea from Arabia and intermittent conquests and penetration from the north by way of Egypt, the Islamized Sudanese are now very largely Arabic in their culture. They believe and feel they are Arabs, they behave like Arabs, and they think they should, and in fact do, identify themselves with the Arab world; and therefore they must be considered as Arabs by heredity or acculturation.[3]

On the other hand, the Southern Sudan is composed of Africans: Nilotics, Nilo-Hamitic, and Sudanic, each of whom falls into a number of subcategories. These subcategories are ethnic groups with differences in tribal cultures and modes of living reinforced by linguistic and religious differences. But whatever these differences are, the people of the Southern region consider themselves Africans and are very different in their attitudes toward the universe and in their value systems from the Arabized Sudanese of the North. The history of hostility, hatred, and conflict between the North and the South has also deepened and exacerbated the differences between the two peoples, thereby making national integration a complex and difficult problem.

The two disparate regions of the Sudan were hostile enemies prior to colonization of the country. The Northern inhabitants tried unsuccessfully to establish colonial rule in the South. They did, however, carry out slave rampages, which have left deep historical memories.[4] The antagonism between the two regions of the Sudan was realized by the Anglo-Egyptian Condominium regime that accordingly established two separate administrative units, one for each region. But whereas social and economic services were launched and developed in the North, the South was treated as, and indeed it remained, a human zoo. Prior to the imperial withdrawal, the South protested against schemes aimed at territorial integration with the North. British interests in the region dictated that the new Sudanese state would include the two regions. Southern troops mutinied against their new Northern officers and in protest against the handing over of the South to the Northern Arab Sudanese who were successfully wrestling power from the departing Anglo-Egyptian colonial officers. With the help of the British Royal Air Force, the Northern Sudanese occupied the South militarily, and African-Arab relations in the Nile Valley assumed a new level of hatred and confrontation. The North believes that the South must be assimilated into the Arab fold by all conceivable means. In pursuit of such beliefs, they regard and treat the whole country as an integral part of the Arab world. This is what led Arnold Toynbee to observe that "the Northern Sudanese are masters in the Southerner's house as well as in their own. They are trying to make up for lost time. They are trying to assimilate the Southern Sudanese to the Northern way of life--an attempt that they were debarred from making under the British regime. This Northern Sudanese reaction is natural, but it is surely wrong, and this both politically and morally."[5]

The North monopolizes and controls critical policy-making institutions in the Sudan, and before the Addis Ababa Peace Agreement, Northern Arab values were imposed on the Southerners by use of force, giving the political system an internal colonialist character.[6] Apparently, internal colonial mechanisms have now been developed to maintain Northern hegemony in the echelons of power.

The economy of the Sudan is mainly agricultural: one-third of the total land area (87 million hectares) is suitable for crop or pastoral production. At present, only 10 percent of it is utilized effectively. In the Northern region, the White and Blue Niles provide an abundance of water, which has enabled the Sudan to develop the largest irrigation system in Africa. Although it is one of the world's poorest countries (per capita income of $290.00), it is the world's main producer and exporter of long and extralong staple cotton (provides 60 percent of exports), and the world's main producer and exporter of gum. Agricultural potential has made it a possible major producer of food for the Arab world. No valuable minerals have been found in large-enough quantities to be exploited economically. And unlike some developing countries, the Sudan is very sparsely populated (with approximately 16 million people only); hence, there is no population pressure on the land presently developed. But it suffers from uneven development within the community as a whole as well as between the North and the South.[7] There are also differences between the economic structure of the rural people--from nomad, camel, or cattle-owning tribes to the subsistence farmers. There are wide variations in the degree of literacy and sophistication throughout the country.

The South is the least-developed region of the Sudan: per capita income is about half that of the national average and perhaps only one-quarter that of the more prosperous provinces of the North.[8] It is relatively neglected in the provision of public services: with over 25 percent of the population of the country, it has little more than 10 percent of dispensaries and dressing statistics; a similarly small percentage of post and telegraph offices; only 5 percent of bank branches, a proportion of children in school less than half of the country as a whole (the ratio of registration for schools in the Southern region is only 8.2 percent in primary schools, 5.6 percent in junior secondary schools, and 4.2 percent in senior secondary schools). Communications are poor and much of the South is cut off from the stream of progress in the rest of the country.

The Sudan has witnessed its leadership shift back and forth between civilians and the military. There has been a high turnover of political leadership, both civilian and military. Those most involved in power rivalries and political competitions are chiefly persons of relatively high socioeconomic status, and they are the Arab Sudanese, who are concentrated in North-Central Sudan. The geographical concentration of this group around the seat of power in Khartoum has helped them to dominate the whole state apparatus, notably the political and educational systems, the administration, and the private and public sectors of the economy. The Arab dominance is clearly demonstrated by the fact that all the heads of government the Sudan has had since independence are of Arab origin. They live predominantly in the urban centers, where they monopolize the resources for political participation.

Loyalties in the Sudan tend to be limited and local--to the family, the tribe, and the religious order. The lack of viable and cohesive institutionalized polity to provide procedures to be used for resolution of political disputes and to provide a fair means of political participation has produced a high frustration index among the elites. This elite frustration coupled with excessive lust for power has been manifested by both civilian and military elites in various attempts to capture power, and thereby establishing a high incidence of political instability.

As in the case with many transitional societies, the political sphere in the Sudan is not sharply differentiated from the spheres of social and personal relations. For instance, among the most powerful influences of the traditional order in the Northern Sudan, where political power is concentrated, there is a persistent survival of a pattern of political relationships largely determined by the pattern of social and personal relations, with the inevitable consequence that political struggles tend to revolve primarily around issues of prestige, status, influence, and personality and not around questions of alternative courses of policy

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action. Political parties in the North represented the subsystems and personalities of particularly influential individuals.

The Sudan is a disconsensus society partly because of its racial, cultural, and ideological pluralism, and partly because there is a great lack of trust among the civilians and the army elites. The political culture is marked by suspicion, jealousy, disrespect, and contempt. There has been a succession of freebooting praetorian regimes concerned with enjoyment of the perquisites which come with seizures of power. The consequent inability of many regimes to provide either a framework of order or welfare leads to diminution of support, frustration, and instability.

Although there is at present only one legally recognized political party in the Sudan, four rival ideological groups can be identified: (1) the Nationalists; (2) the Muslim Brothers and Sectarians; (3) the Communists; (4) the Pan-Arabists.

The Sudanese Nationalists believe in a secular state, and they profess socialism (somewhat diffused) and favor a policy of friendship with both the African and the Arab neighbors. The Muslim Brothers and other militant sectarians (Ansars and Khatmiyyah) would like to turn the Sudan into a purified Islamic state, and they favor close relations with the conservative Arab states. For the Muslim Brothers, the non-Muslims in the Sudan must be converted to Islamic faith by all conceivable means. The Sectarians believe in an Islamic constitution and they would like their respective leaders to rule the country. The Communists are split between a pro-Moscow fraction and one closer to Arab socialists, both basically sharing the same views as the Nationalists about greater cooperation with non-Africa. They advocate state control of the "heights of the economy." The Pan-Arabists are opposed to an Islamic constitution, and argue that theocratic institutions are inadequate to cope with the problems of nation-building in the Sudan. They give high priority to the Arab cause and to active involvement by the Sudan in the Arab war against Israel.

The above survey shows that there are at least six major problems that face the Sudan and its successive governments. First, the huge size of the country with its underdeveloped infrastructure, its poor transportation and communication network, has not been a blessing. Second, the African-Arab schism is a fundamental cleavage that besets the Sudan. This sharp cleavage must not be equated with the issue of ethnic dysfunctionality that is prevalent in other areas of postcolonial Africa. For, although many countries in Africa are struggling with the problem of national integration, few have the pronounced differences of race, culture, religion, or values, which have been reinforced by differences in economic and social conditions and by naked political force as exists in the Sudan. Third, the Sudan has limited economic resources--its agricultural potential is enormous but it lacks the capital to develop it without outside assistance, which has not been flowing regularly. Its economic policies have not reflected the problems that the masses of the population face, and consequently the country suffers from uneven development. Income inequalities are large and have consistently reinforced social stratification patterns. Fourth, the Sudan has not had a constitution for the greatest part of its two decades of independence. The issue of what type of political system the country should have has been a contentious one among the elites. No viable political institutions have hitherto evolved, and political participation remains limited and controlled. Freedom of speech and of dissemination of information is limited to the only existing political organization, the SSU. Fifth, proliferation of ideological groups has contributed to elite instability in the quest for political power and influence. Sixth, the Sudan has not been blessed with a dynamic leadership to confront the crucial issues of nation-building.

Such then are the problems that any government in the Sudan has to face. On coming to power, each successive regime has claimed that it would attempt to solve these problems with more practicable policies and strategies than those pursued by its predecessor. Their records do not validate their claims.

III. Political Engineering: Regional Autonomy and Territorial Unity

The military confrontation between the North and South reached a stalemate in the late 1960s when a new regime of young military officers in the North usurped power through a coup. Most of the members of the new regime had served in the South and had come to the conclusion that a military victory over the Southern Sudanese was a farfetched idea. Hence, they launched a movement of political engineering that subsequently led to a successful peace conference in Addis Ababa, Ethiopia, in March 1972.[9]

The Addis Ababa Peace Accord preserves the territorial unity of Sudan but grants specific powers and functions to the Southern region. Legislation in the South is exercised by a People's Regional Assembly, members of which are elected by Sudanese citizens residing in the South through direct secret ballot.[10] The members of the Regional Assembly in turn elect one of their colleagues as speaker. Legislative authority in the South rests with the Regional Assembly, and areas under its power for legislation include "preservation of public order, internal security, efficient administration, and the development of the Southern region in cultural, economic, and social fields." Regional legislation must, however, conform with national plans. Functions that are exclusively a preserve of the central government and are, therefore, outside the jurisdiction of both the People's Regional Assembly and the High Executive Council (HEC) include "natural defense, external affairs, currency and coinage, air and interregional river transport, communications and telecommunications, customs and foreign trade except for border trade and certain commodities that the regional government may specify with the approval of the central government, nationality and immigration, planning for economic and social development, educational planning, and public audit." The prime responsibility for development planning, plan implementation, and the provision of public services rests with the Southern Regional Government and with the provincial and local governments.

Business is conducted in the Regional Assembly in accordance with rules of procedure that are laid down by the assembly during its first meeting. The Regional Assembly has the legal authority to elect the president of the regional government (chairman of the HEC). The regional president and members of the HEC are answerable to two authorities: the national president and the People's Regional Assembly.

The central power of the state rests with the national president, who regulates the relationship between the HEC and the central ministries. However, the existence of the regional government in the South is guaranteed in the constitution and it cannot legally be altered unilaterally by the central government. The organic law that guarantees and protects the regional government "cannot be amended except by a three-quarters majority of the People's National Assembly and confirmed by a two-thirds majority in referendum held in the three Southern provinces of the Sudan." This legal provision distinguishes the Southern regional government from a merely decentralized government whose local organs can be altered at will by either the national president or the National Assembly.

The Addis Ababa Agreement stipulates that there should be a Southern command of an army to be composed of 12,000 soldiers, half of whom would originate in the South and the other half from elsewhere in Sudan. Most of the troops from the South were drawn from the former Anya-Nya army. There is, however, a provision that there should be integration between the two halves.

The Addis Ababa Agreement is a hybrid of federal and nonfederal features that are narrowly adapted to the specific circumstances of the Sudanese situation. On balance, it is more than a simple decentralized arrangement subject to the unilateral whim of the central government and yet less than a full-fledged federal structure along the lines of the U.S. model, given the degree of control of internal affairs of the Southern region by the national president. There is, therefore, the danger that if the national president interprets the document at will, the written guarantees may be rendered meaningless.

The successful conclusion of the peace negotiations between the North and the South and the ending of the military confrontation brought a considerable relief in Sudan, particularly in the Southern region following the ratification of the agreement. In the short term, unity between the two disparate regions of Sudan is assured; in the long term, relations between the Northern and Southern Sudanese seem uncertain.

IV. Reconciliation and Continuing Tensions

During the 17 years of war, the Northern Sudanese were divided into two camps on the Southern question. There were those who genuinely believed that Sudan could not exist without the Southern region, and there were those who suspected that the "nation" could not function properly and effectively with the Southern region. The anti-Southern region elements were mostly the Pan-Arabists (the Muslim Brothers, Arab Socialists, and traditional sectarians--the Ansar, and the Khatimiyyah leaders). This group sought closer links with the Arab world and closer identification with the problems and fantasies of the Arab Middle East. They resented the perceived African orientation that the Southern Sudan wanted to give the country as a whole. The other Northern group that looked unsympathetically on Southern concerns was the constitutional element. It argued that the granting of regional autonomy to the South would lead to the "Balkanization" of Sudan. Related to this group was one that claimed that the Northern Sudan was subsidizing eventual Southern secession by helping it to become a viable economic unit. And at the lowest level were those Northerners who believed that the Southerners are "just Africans" and would be better left to Africa.

Outside this anti-Southern camp, there was another clique believing that the South and the North are both integral parts of Sudan and that attempts should be made to keep the South at peace with the North but without making it strong enough to challenge the perpetual hegemony of the North at the central decision-making level. This last camp won the argument and is credited with bringing about the regional autonomy agreement. The various elements within the anti-Southern camp conceded, but remain skeptical of Southern intentions and therefore have resorted to various manipulative strategies to render the regional autonomy agreement ineffectual. They have created and contributed to some of the stress and strain in North-South relations since 1972 by sabotaging the effective institutionalization of autonomy in the South.

First, the overlapping of powers between the central and regional governments through the operation of the People's Local Government system has created some difficulties. For example, the provincial commissioners (PCs) in the South report directly to the national president even though their work necessarily concerns matters the Addis Ababa Agreement assigns to the region. Although they are nominated by the president of the HEC and appointed by the national president, their reports sent directly to Khartoum are seen as potential threats to the regional policy-making discretion. So far their selections have been politicized to ensure that they are not stooges of the central government. Another related issue of overlapping of powers is the Public Service of the South, which is supposed to be administered by the regional government. Yet the assistant commissioner of police for the Southern region (the highest-ranking police officer) reports to the commissioner in Khartoum. Although such reports are only routine and the security of the region is technically under the control of the president of the HEC, the position of the police chief in the South remains to be clarified within the Addis Ababa regional scheme.

Second, although Article 5 of the Addis Ababa Peace Agreement stipulates that English be the principal language for the Southern region and Arabic the official language of the Sudan, more emphasis has been put on the teaching of Arabic in schools--at the expense, to be sure, of English and local languages. Related to the language issue is the resurgence of Islamic fanaticism and moves in the North to legislate Islam as the state religion in spite of explicit acceptance in both the Addis Ababa Agreement and in the permanent constitution that the Sudan will not project itself as an Islamic and Arabic state. Pursuit of Arabization and Islamization policies in the South have unfortunately surfaced, and the timidity of the Southern leadership is being interpreted by Muslim fanatics as acquiescence.

Third, the Southern region, one-third of the national population, is neither proportionately nor adequately represented at the national level. At the time of writing, the only Southerner who is a member of the central cabinet is vice-president Joseph Lagu. While Abel Alier was vice-president and president of the HEC, he spent most of his time in the

South managing the affairs of the region and occasionally attended cabinet meetings in Khartoum. Even if he wanted to attend all of them, he couldn't do so because more often than not there is no transport from the regional headquarters in Juba to Khartoum. Thus, at present, the North has exclusive monopoly and control of the critical decision-making process in the country. The South plays no role in the shaping, formulation, and implementation of domestic and foreign policies.

Fourth, the central bureaucracy is entirely Northern Sudanese, so national planning and allocation of domestically generated revenue as well as foreign aid remains in the hands of the North, at both political and administrative levels. Also, state security organs and diplomatic service remain a preserve of the North. Southerners are recruited into the military and police academies, each of which takes 100 candidates annually--at an average rate of three per year, respectively.

Fifth, the Southern region has not been receiving a fair share of revenue and development project allocation. Moreover, money allocated for the South is seldom released on time by the Central Ministry of Finance. In the mid-1970s, sugar projects in Mongalla and Melut in the South were abandoned in preference for Aalaya, West Sennar, and Kenana sugar schemes in the North. Also, Tonj Kenaf and the Wau fruit-canning factories were replaced by the Abu Naama Kenaf project and the Karima fruit-processing project in the Northern region. The Kapoeta cement factory in Eastern Equatoria was abandoned when the central government built a series of cement factories in the North. The only development projects in the South are still at a pilot stage and are those sponsored and funded by the World Bank and the United Nations Development Program (UNDP), whose respective representatives in Sudan are constantly under pressure from leadership in the North to reduce their activities in the South.

Thus, the South remains at the periphery of national decision-making. A feeling of relative economic deprivation is growing, and the intransigent refusal of the Northern Sudanese ruling elite to share real political power and revenue from within, and aid from without, with the Southern Sudanese will gradually erode any desires in the South to identify with the "Sudanese state" to which they should rightly belong.

Yet, despite these shortcomings in the implementation of the regional autonomy in the South, and lack of sensitivity of the Northern leadership to Southern desire for participation in national issues, some Northerners claim that the Southern region has gained a privileged position in the Nimeiry regime and that decentralization should be extended to the North. Proponents for creation of regional governments in the North rested their arguments on the claims that the size of the country and its poor infrastructure militated against responsive and efficient administration from Khartoum, and that uneven social and economic development and ethnic diversity required a decentralized system to satisfy local demands. Above all, it was argued that a decentralized political system would ultimately achieve political aims and meet democratic expectations by involving the public at large and thus weakening elements of opposition. It is worth recalling here that such arguments for devolution of power--regarded as dangerous to the national interest during the time of the war between the North and the South--gained credibility among most Northern Sudanese elites. A long constitutional procedure was followed by the central government before implementing the idea of decentralization. Five regions --Northern, Eastern, Central, Kordofan, and Darfur--were created in mid-1980.

The major difference between the regional autonomy in the South and the autonomy of the regions in the North lies in the fact that while the president of the High Executive Council is responsible to the Southern Regional Assembly and can be removed from office by a two-thirds no-confidence vote of the same assembly, the governors of the Northern regions are at present presidential appointees. Opponents of the Addis Ababa agreement are not happy with this important difference between the Southern region and the other five regions.[11] They immediately embarked on a series of attempts to provoke a confrontation between the central government and the Southern region.

In late 1980, the Northern members of the National Assembly connived with central government ministers and a few of Nimeiry's advisers to redraw the boundaries between the South and the North. In the South, major parts of the Gogrial district in Bahr el Ghazal province and all the "oil areas" in the Bentiu District of Lakes province were incorporated into Kordofan province in the North. Also, parts of Renk district in Upper Nile province were added to the adjacent Northern provinces. The National Assembly, after a walkout by the Southern members, passed legislation to validate the so-called new map. The Southern reaction was instantaneous: there were mass demonstrations in the region against the new boundaries, and the People's Regional Assembly met in an emergency session and passed a resolution that condemned the new boundaries and affirmed the Southern commitment to respect the provincial boundaries acknowledged at the time of independence and recognized by the Addis Ababa Agreement. The regional government in the South supported the Southern stand and argued that it was unconstitutional for the North, through its members of the National Assembly, to alter the boundaries of the Northern and Southern regions. Furthermore, it was up to President Nimeiry either to uphold the constitution respecting the old boundaries and reverse the decision of the National Assembly or to support the new boundaries and explain his decision to the peoples of the South. Nimeiry was allegedly taken unawares by the actions of his ministers and of the Northern members of the National Assembly. He acted swiftly to contain the growing tension between the South and the North by appointing a committee composed of both Northerners and Southerners to examine the boundary issue and make recommendations to him. The committee recommended the reversal of the decision of the Northern members of the National Assembly and the president promptly accepted it.

In the spring of 1981, the Central Ministry of Energy and Mining decided--without consultation with the South--to direct Chevron Oil Company to commit itself to building an oil refinery in Kosti in the North instead of Bentiu in the South, where the company's prospecting had been most successful. The decision of the central government was unpopular in the South, and the regional government tried in vain to persuade President Nimeiry to reverse the unilateral decision of the Central Ministry of Energy and Mining. Instead of responding to the appeals of the South to have the refinery constructed in Bentiu for sound economic reasons as well as to make the South feel pride in contributing to the national economy, Nimeiry threatened the use of military force to coerce the South to accept his decision. The Southern regional government avoided confrontation and indicated that it would respect the decision of the president.

Failing to provoke a confrontation between Nimeiry and the South, opponents of the autonomous status of the South began campaigning for creation of more regions in the South. The idea of dividing the South into two or three regions was first suggested by Northern political parties in the 1960s but was rejected by the Southern parties. The North eventually lead to development of a strong, cohesive, progressive region that could easily secede to form an independent African state. President Nimeiry had ignored that line of reasoning and accepted the Addis Ababa Peace Accord as negotiated by both his own selected team and representatives of the Southern Sudan Liberation Movement. However, the critics of the Peace Accord are now Nimeiry's political allies and hold key positions both in the central government and in the Sudan Socialist Union (SSU). They have successfully persuaded Nimeiry that redivision of the South and creation of regions out of the present region is necessary for perpetual control of the South by the North. They cited the South's resistance to the boundary question and location of the oil refinery in Kosti as indicators of growing Southern intransigence to decisions emanating from the central government. To add political ballast to their argument, they persuaded a Southerner, General Joseph Lagu, who had been living in Khartoum since Nimeiry removed him from the presidency of the South in January 1981, to spearhead the call for redivision of the South. Nimeiry assured General Lagu that he fully supported the idea of creating several regional governments in the South that would have the same powers as those in the North. With alleged financial support and administrative facilities at his disposal, Lagu called for redivision of the Southern region on grounds that it would save the South from institutionalized tribal domination by the Dinka (the largest ethnic group in the South), protect the Addis Ababa Agreement from politicians with tribal inclinations, effect decentralization of power in the South, and guarantee the concept of a united Southern Sudan by accommodating the aspirations of the various communal groups in the South.

Lagu's call for creation of several regions in the South was received with shock and bewilderment. An overwhelming majority of the Southern members of the Central Committee of the SSU cabled President Nimeiry, ignoring the public outcry, included the issue on the agenda of the Central Committee meeting, where it was sweepingly condemned, and referred it to the local SSU units in the South to discuss and settle.

Meanwhile, attempts were made to amend the permanent constitution to enable the president to create more regions in the South. The regional government maintained that to amend the permanent constitution, Nimeiry would have to comply with the provisions of Article 34 of the Self-Government Act of 1972, which specifically protects the South as a single region and stipulates that an amendment can be made only by a majority (three-quarters) of the People's National Assembly and the approval of a majority of two-thirds of the citizens of the Southern region in a referendum to be carried out in that region. Nimeiry's legal advisers counseled adherence to the constitutional procedure. Proponents of redivision, however, began to urge Nimeiry to overlook the legal restrictions on his powers and to order the creation of more Southern regions on grounds of public interest. Once again, in mid-1980, the Southern regional government appealed to Nimeiry to protect and respect the permanent constitution of the country. After failing to maneuver the Southern leadership on the sensitive issue of redivision of the South, Nimeiry summoned an emergency meeting of the SSU Politbureau to discuss the subject. For three consecutive days, September 15-17, 1981, the Southern members won the overwhelming support of their Northern colleagues against redivision of the South. It was bad economics, the

Southerners persuasively argued, because the central government was not in a financial position to maintain additional regional bureaucracies, and new regional governments in the South could not sustain themselves. It was bad politics, they maintained, because proponents of "redivision" were appealing to local sentiments among rival ethnic groups, and such politics would be detrimental to the health of the Southern region and of the Sudan at large. The critics of redivision pointed out that implementation of decentralization programs (which have already been announced) within the Southern region would accommodate the aspirations of the local communities and allay their fears of domination by larger ethnic groups. The overwhelming majority of the members of the SSU Politbureau appealed to President Nimeiry to abandon the idea of redivision completely. Nimeiry was reported to have assured his colleagues that he would appoint a technical committee to examine the issue in detail and report back to the SSU Politbureau.

However, a few days later, Nimeiry dissolved both the National Assembly and Regional Assembly, as well as the regional government in the South. His rationalization was that the establishment of five regional governments in the North required a change of regional representation in the National Assembly to reflect the new balance of power relationship between the regions and the center. Regarding the dissolution of the Regional Assembly, he argued that the issue of redivision of the South required public debate and that the Southern masses should express their opinion through a referendum if the newly constituted National Assembly approved the proposition for redivision. Of course, there were no grounds at all for Nimeiry to dissolve the regional government. He lost Southern trust and confidence overnight. The South, however, decided to avoid a confrontation with Nimeiry and pledged to follow the constitutional process to express its position on the diversionary issue of redivision.

After dissolving the assemblies and the Southern regional government, Nimeiry appointed an interim military government in the South to supervise elections for a new National Assembly and a referendum on the proposition of redivision of the South. All the nominees for the interim High Executive Council headed by Major General Gasmallah Rassas were proposed by Lagu and are mostly from among his supporters for creation of several regions in the South. Nimeiry also reduced the Southern representation in the National Assembly to less than one-fifth of the total membership (28 out of 151) to ensure passage of the redivision issue. These actions reinforced the impression that Nimeiry was set to create more regions in the South regardless of the overwhelming Southern opposition to it. In order to mobilize effective defeat of the idea of redivision in the forthcoming referendum, its opponents formed the Council for the Unity of South Sudan in December 1981 under the chairmanship of the Sudanese elder statesman, Clement Mboro and composed of people of different political persuasions. Its executive committee sent a letter to Nimeiry informing him of the formation of the council and assured him that the council would work within the organs of the SSU--after all, all of its members were prominent SSU members. Nimeiry reacted swiftly by ordering the arrest of the entire executive of the council (21 persons). Subsequent pressure and protest led to the release of those arrested, but Samuel Aru Bol, at the time of this writing, is still languishing in detention. Surprisingly, the South remained restrained in spite of all these provocations.

In a tactical move, President Nimeiry reversed himself in March 1982, on the issue of creation of more regions in the South. He announced in his address at the opening of the newly elected People's National Assembly that the subject of redivision had created unacceptable differences between the Southern politicians, and that he preferred the subject dropped from any further discussion. The constitutional procedure for resolving the issue was thereby terminated. However, in speeches he made in the South soon after his opening the National Assembly, he revived the idea of decentralization in the South. His dismissal of Abel Alier as vice-president and replacement with General Joseph Lagu may be a move aimed at solidifying the forces for redivision prior to carrying it out even outside the constitutional channels.

Conclusions

The development of an internal colonial system in the Sudan that has facilitated Northern Arab Sudanese hegemony over the Negroid Africans of the South is not validated through legal instrumentalities. Systemic discrimination against the South is predicated upon racial, cultural, religious, and regional differences. Anglo-Egyptian colonial rule compounded the conflicts between the two regions by concentrating social and economic development in the North, making it a stronger partner with the South in an independent Sudan. Arab cultural imperialistic inclinations to and policies toward the South, reinforced by economic strangulation and sustained by a military occupation for 17 years (1955-72) prohibited regional understanding and cooperation. The Addis Ababa Peace Agreement became an act of political engineering: it temporarily eased and politically transformed the African-Arab conflict.

The Addis Ababa Agreement granted the South autonomous status within a united Sudan. It was essentially a political and legal settlement providing governmental machinery through which the fundamental human rights of the Southern Sudanese could be respected and expanded. It provided a framework for conflict regulation between the Southern and Northern Sudanese. The Addis Ababa Agreement is a unique document in the history of independent Africa, responding to specific historical circumstances and recognizing the African-Arab duality of Sudan and the various power configurations in the country. Recently, however, Nimeiry has been persuaded to abandon the accord by its opponents, to create several regions in the South, and to give these regions the structure, power, and authority of regions in the North. Such an arrangement would eliminate further consolidation of the Addis Ababa Agreement and render the South powerless, placing it at both the indefinite control and mercy of the Northern-dominated central government. It is inconceivable that the South will submit to such a drastic curtailment of its present margin of autonomy.

The present tension between the Southern Sudanese and Nimeiry's regime does not provide an optimistic scenario. Moreover, the crisis is taking place in the context of a fundamental malaise in the national polity. Justification of power throughout Sudan under Nimeiry has been actively pursued through the state apparatus and through the SSU. Channels of propaganda have been developed to win the allegiance and participation of the elite. The widening of the economic gap between the state and commercial bourgeoisie, on the one hand, and the mass of population, on the other, has spurred the evolution of a well-defined context for power relations centering upon Nimeiry. The rest of the population has been either intimidated by occasional shows of force or mystified by grandiose visions of a prosperous future and of Nimeiry's presumed "enlightened leadership." Presidential power has relied more on the valorization of authoritarian principles of rule than on the embodiment of impersonal principles in an institutionalized context for power relations. Communication, participation, and responsiveness revolve around the office of the president and are organized in a strict hierarchical pattern. Information is disseminated at increasing levels of generality as one descends the political and social ladders, and payoffs vary proportionately to the quality of an individual's relationship with Nimeiry and his immediate entourage. If political development and legitimation lie in the creation of institutions transcending the temporally limited authority of individual politicians, it seems that the justification of the regime's power does not rest on a solid consensual foundation. Even though Nimeiry's position is so central and dominant that it creates conformity in political behavior and continuity in the pattern of power relations, the political system he has developed cannot stand on its own precisely because the hierarchy is not committed to the organization of its roles within a specific institutional framework, but rather to a single leader who can define to a large extent permissible forms of political interaction.

It is doubtful that the Sudan Socialist Union (SSU) could routinely handle the problem of succession or even survive without the central bond provided by the presidential office. Similarly, competition for the economic benefits of political power would be unbridled were Nimeiry to disappear, since there are no solid national centers of economic policy-making. A new greedy, corrupt, and abundantly mediocre group has emerged that, through the mediation of Nimeiry, has been able to amass wealth. Without the extravagant use of patronage and coordination of parochial interests by Nimeiry through his network of proteges and informers in the national sphere and supporters in the foreign sphere, the Nimeiry regime probably would have collapsed by now. So far, no amount of SSU propaganda regarding the need to develop a national consciousness or rational progress toward the achievement of collective goals can deeply touch the various levels of the political hierarchy when modes of participation related to these ideas have not been established. Indeed, the life of the SSU depends on that of Nimeiry, for the political system that he has built has constantly sacrificed institutionalization for the maintenance of control over real or imagined opponents who pose personal threats to the president.

A political system that is held together by the authority of an individual presidential monarch, and by the mechanisms of consent offered by patronage, will inevitably be vulnerable to variations in the nature of foreign financial and military support and international political and economic trends. This weakness has definitely been manifested in the Sudan partly as a result of Nimeiry's zigzag foreign policy and partly as a result of foreign actors shifting and readjusting their interests and strategies accordingly. Major challenges to the regime bring with them an increased need for coercive security measures and further imperil the possibilities of developing a broad consensual context for the definition of "state coherence" and the exercise of power. Creative change must be continually postponed because of the need to reconsolidate power and authority. Henceforth, the relationship between the state and the governed remains one between domination and, alternatively, submission, acquiescence, or rebellion.

NOTES

1. This issue has been treated in depth in my book, The *African-Arab Conflict in the Sudan* (Africana Publishing House: Holmes and Meier, New York, 1978).

2. See Wai, *The African-Arab Conflict in the Sudan*, chap. 2.

3. This point has been forcefully stated in Wai, "Revolution, Rhetoric and Reality in the Sudan," *The Journal of Modern African Studies*, 17, 1 (1979), pp. 72-75. Also see Oluwadare Aguda, "Arabism and Pan-Africanism in Sudanese Politics," *The Journal of Modern African Studies*, vol. 11, no. 2 (1973).

4. See Richard Gray, *A History of the Southern Sudan, 1839-1889* (London: Oxford University Press, 1961); Robert O. Collins, *The Southern Sudan 1883-1898* (New Haven: Yale University Press, 1962); Collins, *The Southern Sudan in Historical Perspectives* (Tel Aviv: University of Tel Aviv, The Israel Press, 1975).

5. Arnold Toynbee, *Between Niger and Nile* (London, 1965), pp. 5-6.

6. See P. S. Casanova, "Internal Colonialism and National Development," in *Studies in Comparative International Development* (St. Louis: Social Science Institute, Washington University, 1965), vol. 1, no. 4, p. 33.

7. For details see *Growth, Employment and Equity in the Sudan*, ILO, 1976.

8. *Ibid*.

9. For details of the Peace Settlement, see "The Addis Ababa Agreement on the Problem of South Sudan," in Dunstan Wai, ed., *The Southern Sudan and the Problem of National Integration* (London: Frank Cass, 1973), Appendix VII.

10. Parts of this section and the next one appeared in my article on the crisis in "North-South Relations in the Sudan," *Africa Report*, March-April, 1982.

11. So far President Nimeiry has sacked two regional governments in the South, acting on a decree that is not constitutional since it does not conform with the provisions of Article 34 of the Permanent Constitution of the Sudan.

THE RIGHT TO EDUCATION: THE CASE OF THE FEDERAL REPUBLIC OF GERMANY

Klaus Hufner

I. Introduction

The notion of "affirmative action" can be defined in two ways: (1) in a broader sense, affirmative action includes all normative-political, legal, and economic-financial measures that are undertaken in order to assist an identifiable group in terms of differences with regard to social-class origin, sex, language, or ethnicity; (2) in a restricted version, affirmative action programs are specific legal measures directly or indirectly linked with financial assistance programs in order to help an identifiable group that is discriminated against.

Whereas the first type is of social policy importance for Western European countries that have a well-structured and organized multilevel state authority and permit a general welfare state policy, the second type is important and necessary for those states such as the United States that favor market-oriented mechanisms.

In more theoretical terms, two extremes can be distinguished: (1) the neoclassical world of a free market in which the ideology of the individual as the basic unit of action and ultimate source of value is of primary concern; and (2) the Leontief world of state planning in which the ideology of the state as the locus of organization and vehicle of societal development is of primary importance.

These two extremes are, of course, only ideal models that do not reflect reality. However, in all Western societies, a permanent competition between both ideologies can be observed: whereas the mainstream of American tradition and practice affirms the rights of the individual and, therefore, seeks to protect the individual against his/her own government, the Western European tradition thinks primarily in terms of obligations that compel governments to act positively for the enjoyment of basic rights as laid down in national and international legislations on human

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rights that commit national governments to achieve these benefits on behalf of individuals.

Given these differences, American-type affirmative action programs do not exist in the Federal Republic of Germany as a major type of social policy action. This does not mean, however, that similar social problems of discrimination do not exist in Germany; but the solution mechanisms to overcome specific types of discrimination differ considerably.

This paper is restricted to educational problems; it deals with the extent that the right to education is implemented for specific underprivileged groups in German society--for example, girls, children of workers' families, children of migrant workers.

Before dealing with the de jure and de facto aspects of the right to education in the Federal Republic of Germany, some brief remarks are necessary in order to explain the distribution of legal-integrative, political-administrative, economic-financial, and planning competences in education.

According to Articles 7 and 30 of the Grundgesetz (basic law), education in its entirety is to be placed under state supervision. The exercise of state responsibility falls, however, within the jurisdiction of the eleven Lander (states) of the Federal Republic of Germany. The "cultural sovereignty" of the Lander implies that they have the majority of educational competences in law-making, administration, finance, and planning. In order to avoid the development of completely different education systems at the Lander level, the Lander ministries established in 1949 a Standige Konferenz der Kultusminister der Lander (Permanent Conference of State Ministers of Culture; KMK) as a council for coordination that deals with issues such as length of compulsory education, entrance requirements, regulation of transfers, and examinations. In 1969, changes of the Grundgesetz increased the educational competences of the Bund (federal government). Before that date, the Bund had only legislative authority over the out-of-school part of vocational education; in addition to that, the Bund also had all the competences in the field of foreign policy including foreign culture policy (the implementation of bilateral and multilateral treaties in this field imply, however, rather complicated procedures of cooperation between the Bund and the Lander). Since 1969, the Bund gained some additional competences: e.g., in the field of tertiary education dealing with the "overall patterns of law of higher education" as well as with the Gemeinschaftsaufgabe (joint task) "modernization and facilities of higher education." Furthermore, the change of the constitution offered possibilities of a joint educational planning policy between the Bund and the Lander. For that matter, the Bund-Lander-Kommission fur Bildungsplanung (BLK; Bund-Lander-Commission for Educational Planning) was founded in 1970. For the first time in the history of the Federal Republic of Germany, a national body became responsible for planning[1] the development of education at all levels, without, however, changing or even limiting the sovereign rights of the individual Lander with regard to their educational systems.

The basic structure of the German educational system, which is still characteristic today, was stabilized during the early 1960s. Compulsory education begins for all children at the age of six: for four years (in West Berlin, six years), they then attend a common Grundschule (primary school). Before the compulsory school age, the possibility of voluntary attendance at kindergartens exists. After four years of primary education, the pupils are distributed among three different types of secondary school. These different types of school last for different time periods and lead to different examination certificates that are, relatively closely, linked to admission credentials for different types of occupation. This implies that relatively important career decisions are to be made at the age of 10 or 11.

The major three components of secondary education are the following ones:

1. The Hauptschule of five compulsory years. This type of school leads to practical vocational training or to employment. Some Lander also offer a voluntary or compulsory 10th year of schooling; after its completion a Realschulabschluss may be obtained;

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2. The Realschule of six years leads to a certificate that opens the way to commercial and technical occupations; and

3. The Gymnasium, which leads to the "Realschulabschluss" after 6 years and/or to the Abitur after 10 years of schooling; the Abitur is the entry qualification for admission to the institutions of higher education.

Pupils who leave the Hauptschule, Realschule, or Gymnasium must decide whether to take up a vocational training program in a full-time vocational school or in the dual system (a combination of "learning on the job" and attending a public part-time vocational school).[2] Today, the majority of those who obtained the Abitur (65 to 70 percent) enter the system of higher education immediately afterward.

With regard to enrollment figures in absolute and relative terms, important changes occurred in this basic structure between 1960 and 1980, which were partly due to dramatic demographic cycles and partly due to sharp increases in the demand for high school examination certificates (Abitur). This, in turn, can be explained partly as the results of deliberate educational reform measures (for some statistical information see Section III of this paper).

In 1964, Georg Picht provoked an intensive and broad public debate when he referred to the existence of a "German educational catastrophe."[3] He asked for educational opportunities for everyone within a modern industrial society. One year later, Ralf Dahrendorf published his programmatic book on education as a civil right[4] and claimed an active educational policy leading toward a "material quality of opportunity" for all citizens through major changes of the educational system in the Federal Republic of Germany. The formula "right to education" became a prime mover for intended educational as well as societal reforms in Germany.

In the field of education, these demands implied rather concrete proposals: besides increases of attendance ratios in Gymnasien and institutions of higher education, the introduction of new structures (e.g., the Gesamtschule [comprehensive school] at the secondary level and the Gesamthochschule [comprehensive university] at the tertiary level), new programs of teacher training, improvements of adult/recurrent education, etc., were discussed. Before presenting and evaluating the results of these debates (cf. Section III), the legal implications of the right to education at the national and international level will be discussed in the following section.

II. The Right to Education: A Legal Overview at the National and International Level.

Basic rights to education are guaranteed in the Grundgesetz as well as in some of the Lander constitutions. However, the Grundgesetz does not contain explicitly a "basic right to education"; the fathers of the Grundgesetz restricted themselves to the classical civil and political rights. But the Bundesverfassungsgericht (Federal Constitution Court) interpreted the Grundgesetz in connection with Article 3 (I) on the principle of general equality and with Articles 20 (I) and 28 (I) on the principle of the social state in such a way that they assumed different education and training specific basic rights.

Some Lander constitutions deal explicitly with basic rights to education, namely, the constitutions of Baden-Wurttemberg, Bayern, Bremen, Nordrhein-Westfalen, and Rheinland-Pfalz. Article 2 (I) of the Baden-Wurttemberg constitution states that every young person has--regardless of his/her social background or economic situation--the right to education and training corresponding to his/her abilities.

In addition to the Grundgesetz and the Lander constitutions many other inner-state legal sources exist in the Federal Republic of Germany which can be interpreted as implementation laws of the Grundgesetz and which offer concrete measures. Furthermore, the Federal Republic of Germany became party to several international conventions that contain the right to education as a human right.

On December 10, 1948, the UN General Assembly adopted the Universal Declaration of Human Rights. Article 26 (I) proclaims that "everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be equally accessible to all on the basis of merit." Although the Universal Declaration is not, as such, a legally binding document, it has exercised a powerful influence both at the international and national level.

On December 16, 1966, the UN General Assembly adopted the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, together with the Optional Protocol to the Covenant on Civil and Political Rights.[5] These two Covenants are legally binding treaties.

Article 13 of the first of the above-mentioned Covenants is wholly devoted to the right to education, and the opening paragraph is of particular importance:

> 1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all social, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

On December 14, 1960, the UNESCO General Conference adopted the Convention Against Discrimination in Education and a Recommendation containing similar substantive provisions.[6] The UNESCO Convention restates two principles of the Universal Declaration, namely, the prohibition of any kind of discrimination[7] (Article 2) and everyone's right to education (Article 26). The purpose of the UNESCO Convention is, therefore, not only to eradicate all forms of discrimination but also to ensure steps toward increasing equality of educational opportunity and treatment.

Article 1 of the convention states that:

> The term "discrimination" includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) of depriving any person or group of persons of access to education of any type or at any level;
(b) of limiting any person or group of persons to education of an inferior standard;
(c) subject to the provisions of Article 2 of this convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
(d) of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.

To enable UNESCO to determine the extent to which its member states apply the Convention, it stipulates that the states should submit periodic reports. These are examined in accordance with the procedure established in 1965 by the Executive Board of UNESCO. Besides this, in 1962, the UNESCO General Conference adopted a protocol instituting a Conciliation and Good Offices Commission responsible for seeking the settlement of any disputes that may arise between states parties to the above-mentioned Convention Against Discrimination in Education. This protocol became effective as of October 24, 1968.

At the Western European level, the members of the Council of Europe --including the Federal Republic of Germany--adopted on November 4, 1950, the Convention of the Protection of Human Rights and Fundamental Freedoms.

The original text contained no provisions concerning the right to education, but the First Protocol to the Convention established in Article 2 that "no person shall be denied the right to education. In the exercise of any function which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

The child's right to education is reaffirmed in Article 7 of the European Social Charter, which came into force on February 26, 1965. The Federal Republic of Germany accepted, inter alia, that no young person to be employed in work should be deprived of compulsory education.

III. Developments in German Education, 1960-80

Before dealing with some specific issues of equal educational opportunity, some general statistical figures about the educational development in the Federal Republic of Germany over the last two decades should be mentioned.[8]

> The overall figure of kindergarten places increased from 0.817 million in 1960 to 1.391 million in 1979;
>
> The number of pupils at *Gymnasien* increased from 0.642 million in 1960 to 1.544 in 1980;
>
> During the 1970s, all *Lander* set up *Gesamtschulen* (most of them for experimental purposes): in 1980, Germany had a total of 255 *Gesamtschulen* (as compared with 2,477 *Gymnasien*); in the same year 16,800 pupils were at *Gesamtschulen* of the secondary level II;
>
> In 1980, 50.4 percent of all pupils at *Gymnasien* were girls, as compared with 41.1 percent in 1960;
>
> Looking upon the proportion of girls at *Gymnasien* of the secondary level II, the share increased from 36.5 percent in 1960 to 49.2 percent in 1980;
>
> Between 1972 and 1980, the number of pupils per teacher decreased from 26.6 to 21.9 for all institutions of primary and secondary education, from 34.3 to 25.2 in primary schools, and from 45 to 34 in vocational schools;
>
> Public expenditures per pupil increased between 1965 and 1980 from 1,100 to 3,700 German marks (DM) for all institutions;
>
> In 1980, the average expenditures per pupil were at the primary schools and *Hauptschulen* 3,330 DM, at the *Realschulen* 2,910 DM, at the *Gymnasien* 4,260 DM, and at the vocational schools 2,360 DM;
>
> Overall educational expenditures, measured as a proportion of all public expenditures, increased 11.3 percent in 1965 to 15.2 percent in 1980;
>
> Enrollment ratios (percentage of the average of the 19- to under-21-year-old population) of all first-year students in higher education increased from 7.9 percent in 1960 to 19.4 percent in 1980; and
>
> The corresponding enrollment ratios of female first-year students increased from 4.4 to 16.0 percent during that period.

All these figures indicate dramatic changes in the social demand for education. Although detailed empirical evidence is not available, it can be stated that the increases in the social demand for education can be partly explained by "push" factors on behalf of the individual households and partly by "pull" factors of an open door policy of the Lander governments that provided additional institutions and places in their systems of education. The equality-of-educational-opportunity argument as well as the investment-in-human-capital argument worked together and made these changes possible during a period of a flourishing economy with high rates of economic growth. The impact upon the educational system can be illustrated by the changes in enrollment ratios of 13-year-olds between 1960 and 1980. In 1960, about 70 percent of all pupils attended Hauptschulen (and primary schools), about 15 percent Gymnasien, and 12 percent Realschulen. In 1980, the corresponding figures were about 39, 28, and 26 percent. By 1980, discrimination against girls in secondary education had practically ended, although in higher education, female students were still somewhat underrepresented.

Whereas in the early 1960s the three-level system strongly discriminated against pupils from socially disadvantaged families, especially against children of workers and those from rural areas, the 1970s showed visible progress, although the higher social classes still maintained much of their initial advantage. Looking upon pupils between 13 and 14 years according to their social background, the following changes occurred between 1972 and 1980 (cf. table 1):

In 1972, out of 100 children aged 13-14 from workers' families, 76 went to Hauptschulen, 17 to Realschulen, and only about 6 to Gymnasien. In 1980, the corresponding figures were 62, 23, and 10.

In the case of officials, the percentage of all children in that age group attending Hauptschulen further decreased from 30 to about 20 percent between 1972 and 1980, whereas in 1980 more than 51 percent of all children from officials went to Gymnasien. In 1980, almost two-thirds of workers' children attended Hauptschulen and only one-third of them went to Gymnasien.

In higher education, the proportion of first-year students coming from workers' families increased from about 8 percent in 1967 to about 13 percent in 1979. Again, it should be stressed that--despite the indicated progress--students of workers are still highly underrepresented, although

Table 1

Pupils Aged 13 and 14 According to School Type and Occupational Status of Head of Family, 1972 and 1980

		Occupational Status of Head of Family				
School Type	Total	Self-employed, incl. family business	Officials	Salaried Employees	Workers	Others
		% of the age group				
	1972					
Hauptschulen[1]	60.1	51.3	29.6	37.3	76.4	70.3
Realschulen	19.9	23.1	23.2	25.4	17.1	13.1
Gymnasien	20.1	25.6	47.2	37.3	6.5	16.6
Total	100.0	100.0	100.0	100.0	100.0	100.0
	1980					
Hauptschulen[1]	45.7	39.8	20.5	25.5	62.4	61.7
Realschulen	25.5	28.9	25.0	30.5	22.7	18.7
Gymnasien	24.3	28.2	51.1	39.4	10.0	15.0
Comprehensive schools	4.4	3.1	3.4	4.6	4.9	4.7
Total	100.0	100.0	100.0	100.0	100.0	100.0

Source: Statistisches Bundesamt (unpublished material of the microcensus).

[1] Including schools for the handicapped.

corrective measures, especially in terms of financial assistance (which will be discussed in section V), were undertaken.

All the information given so far refers only to German pupils and students. The discussion about education as a civil right in the late 1960s and 1970s did not refer to ethnic differences in the equality of educational opportunity. The specific problems of children of migrant workers, which will be treated in detail in section IV, became "visible" in the late 1970s. But the available information about differences of educational access and success between German and non-German groups in secondary education is still extremely limited. More detailed studies concerning these issues are to be expected during the early 1980s.

Finally, two issues should be discussed that are related to equality of access to higher education in Germany. One refers to the problem of the _numerus clausus_, the other to the quota system for foreign students.

Both problems cannot be understood without a basic knowledge of the organization of higher education in the Federal Republic of Germany. Since the system of higher education is a state system, administrative measures are necessary in order to regulate it. Basically, those measures are functional equivalents for "prices" in market systems. If, for example, the private demand for higher education in general or for specific types of it is higher than the supply, the "price" for it will increase. In the United States, the price mechanism works, _inter alia_, quite well via tuition fees; in Germany, where students do not have to pay any study fees, only administrative measures can replace the price mechanism.

Since, due to the overall educational expansion, the universities were unable to meet the individual demand for higher education with regard to all fields of study, a general _numerus clausus_ was introduced in the fields of medicine, dentistry, veterinary medicine, and pharmacy. Those who qualified but could not be accepted were put on a waiting list whereby, besides the student's average grade of the final examination (_Abitur_), other factors such as military service and residence in the same _Land_ in which the university is located were taken into account.

In the early 1970s, the constitutionality of the application of the numerus clausus was questioned when individual students went to the administrative courts of their Lander. Two of them referred the cases to the Federal Constitution Court (Bundesverfassungsgericht) for its opinion.

On July 18, 1972, the Bundesverfassungsgericht announced its decision: in the two special cases, the applicants were to be admitted to the medical schools of the University of Hamburg and of the University of Munich for the following reasons:

(a) The University of Hamburg failed to list the kind of criteria to be used in order to determine the acceptance of applicants; and

(b) In the case against the University of Munich, Article 3(2) of the Bavarian Admission Law was unconstitutional because it discriminated against residents of the other Lander of the Federal Republic of Germany.

The decision of the Bundesverfassungsgericht was made on the basis of Article 12 (1) of the Grundgesetz, which guarantees to all Germans "the right to freely choose their trade or profession, their place of work and their place of training." However, the numerus clausus, although inherently unconstitutional, was seen permissible only if the university applying it could demonstrate that all places in the department in question were completely filled.

As a result of this decision, the administrative procedures were further developed in terms of a capacity ordinance on the basis of curricular norms and a central office of university admissions; furthermore, special tests were developed in order to assess those qualities necessary for a given profession, e.g., a physician (for further details see Merritt, pp. 12 ff.). Undoubtedly, the teaching capacity increased in such fields in which the numerus clausus had been invoked; nevertheless, in some fields, such as medicine, dentistry, and veterinary medicine, the number of applicants remained higher than the number of places available. Given the high birth rates of the 1960s and the increases of the individual demand for higher education on one side and the cuts of public budgets devoted to higher education on the other, a further sharpening of the situation can be anticipated for the middle of the 1980s.

In the case of foreign students, a quota system has been introduced and administered by the central office of university admissions. In general, 8 percent of all places for first-year students are reserved for foreigners. In the *numerus clausus* fields of medicine, dentistry, veterinary medicine, and pharmacy, this quota has been reduced to 6 percent. Furthermore, it has been decided that no more than 25 percent of all students should belong to the same nationality. In 1980-81, about 5.5 percent of the total student population were foreigners. About 60 percent of them came from developing countries, 40 percent from industrialized countries.

Among the foreign students who stay in Germany for a full study program, about 90 percent come from developing countries. The German authorities claim that absolute number of foreign students (in 1980-81 about 58,000) should be kept, which might lead to a visible decrease of their share in the total student population, when the high birth cohorts enter the higher-education system.

The major problem is the increase of applicants from developing countries. Compared with other Western industrialized countries, Germany does not ask for study fees. In Great Britain, e.g., foreigners outside the European Communities must pay 2,000 pounds per year in the humanities, 3,000 pounds per year in the sciences, and 5,000 pounds per year in medicine; in Belgium, foreigners have to pay fees that are 50 percent higher than for nationals.

Here again, the German authorities decided in favor of administrative measures, although even within a primarily state-administered system, "prices" such as fees could be used for allocation purposes.

Besides this overall policy, specific measures will be necessary in order to assist foreign students in Germany. At present, the drop-out rate is overproportionately high and the average duration of study relatively long. Furthermore, the "brain drain" phenomenon must be reduced. Meanwhile, the federal government offered financial assistance to pilot projects, but the initiatives at the *Lander* and university level are still relatively modest.

A problem that will confront the educational administrators in the very near future has been already recognized but remained so far unsolved, namely, the question of how the children of migrant workers should be treated within the current admission procedures. Two groups can be distinguished: (a) those applicants who received their education in Germany and in their countries of origin and (b) those applicants who attended school only in the Federal Republic of Germany. In the case of the second group, the question remains to be answered whether the Abiturienten of foreign nationality should receive a special bonus with regard to the average grade of their final examination when they apply for study places. In the case of students from migrant worker families, affirmative action programs might be extremely helpful in order to overcome their specific difficulties.

IV. Migrant Workers in the Federal Republic--Educational Problems of Their Children

The hope that migration movements in Western Europe from the "South" to the "North" can be treated exclusively in economic terms had to be given up during the course of the 1970s. The old formulas are no longer valid--in the North: decrease of manpower shortages and thereby continuation of economic growth; in the South: decrease of unemployment and underemployment; and within the long term: positive spillover effects for the South via returning migrants, and in the North, avoidance of social costs by applying the "rotation principle."

Although worldwide recession, inflation, and unemployment, combined with restrictive measures such as the Auslanderstopp of November 1973, whereby entry by visa into the Federal Republic of Germany for purposes of employment has been completely blocked, led to a decrease of the absolute number of migrant workers in the Federal Republic of Germany, severe follow-up problems remain unsolved; the German society, still claiming to be legally no "immigration country," is confronted with a long-term development process of integrating an increasing number of multicultural and multiethnic groups during the coming decades.

The Auslanderquote (proportion of foreign workers in the labor force) reached its first peak with 7 percent in 1966, went down for two years and then climbed up to almost 12 percent in 1972. Afterward, it showed decreases, but always remained over 10 percent.

In 1980, among the population resident in Germany, about 7.2 percent were foreigners. In addition to the actively 2.17 million employed people mentioned above there lived about 2.28 million non-active family members in Germany (including about 1.12 million children under 16 years of age of whom 581,000 [51.8 percent] were born in Germany).

The duration of stay of migrant workers increased dramatically. Whereas in 1973 only about 11 percent of them had come to Germany 10 years or more before, this percentage increased by 1980 to about 38 percent.[9] In 1973, more than half of the migrant workers stayed in Germany less than four years, in 1980 only about one-fifth.

The proportion of foreigners born in the Federal Republic of Germany increased from 1.2 in 1960 to 13 percent in 1980. This share reached its peak in 1974 with 17.3 percent. In absolute terms, this means that in 1960 about 11,000, in 1974 about 108,000, and in 1980 about 81,000, foreign children were born in Germany.

- The increased inflow of migrant workers and their families as well as the increased number of births of foreign children in the Federal Republic of Germany--combined with a dramatic decrease of German births between 1965 and 1975--had an immediate impact upon the educational system, especially at the elementary and primary level. The official statistics at the federal level do not offer detailed figures about the number of foreign children in kindergartens. In 1980, the federal government deplored that about 70 percent of foreign children (even 85 percent of the Turkish children) did not attend any institution of the elementary sector, although especially kindergartens could fulfill an important function in the social integration process of foreign children.

The number of all foreign pupils in general and vocational education increased dramatically during the 1970s. In 1970-71 there were about 180,000 foreign pupils in institutions of general and vocational education, which corresponded to a foreign proportion of about 1.7 percent. In 1980-81, there were about 738,000 foreign pupils in those institutions, which means that the proportion of foreign pupils jumped up to about 6.3 percent within a decade. The largest proportion of foreign pupils came from the six "emigration countries" of migrant workers, namely, Greece, Italy, Spain, Portugal, Turkey, and Yugoslavia. Their share increased from 71.7 percent in 1970-71 to 86.5 percent in 1980-81. The by far largest group were Turkish pupils; their share increased from 22.4 percent in 1970-71 to 58 percent in 1980-81.

Government figures offer an overall picture about the development. The number of foreign pupils in primary schools and Hauptschulen increased from 138,000 in 1970-71 to about 523,000 in 1980-81. In 1980-81, 28,000 attended schools for the handicapped, 28,000 Realschulen, 59,000 Gymnasien and comprehensive schools, and over 100,000 vocational schools.

Looking upon the distribution of foreign pupils in general education, the share of Turkish pupils increased from 17 percent to almost 50 percent during that decade. The share of Yugoslav pupils increased from 7.6 percent to 10.2 percent, the share of pupils from Portugal from 1.2 percent to about 3 percent.

During the same time period, a relative decline could be observed for Greek pupils (from 16.6 percent to 8 percent), for Italian pupils (from 22 percent to 12 percent), and for Spanish pupils (from about 11 percent to 4 percent).[10]

Estimates about the nonattendance of foreign pupils varied especially at the beginning of the 1970s. At that time, one estimated that about 50 percent of those of compulsory school age did not attend any German school. Later on, one estimated that about 30 percent did not attend German schools, whereby also those were included who should attend vocational schools for one day per week. At this point, it should be mentioned that it is not very easy to make clear-cut statistical distinctions. This is especially due to the fact that foreign children under 16 years of age who enter the Federal Republic of Germany are not officially registered. Therefore, only by combination of different information sources can some "proxy" estimates be made. But the situation did improve after the controlled coupling of children allowances and official attention certificates of those of compulsory school age was required.[11] However, at the federal level, no data are available about foreign pupils who are supposed to attend school, who enter the school system as beginners or at higher grades or who move abroad again. The same is true with regard to the number of foreign pupils who failed, who left the schools without a certificate, or who reached specific certificates within the German school system.

Some data from individual Lander show that the repetition ratios, especially at the lower grades, are very high among foreign pupils and that a very high proportion enter or leave school during the official school year, which implies a reduction of school attendance in the Federal Republic of Germany and reduces the chance of getting a graduation certificate.

In a recent study on children of workers in the German educational systems, the federal government also referred to children of migrant workers as belonging to the worker class. Based upon some regional evidence, the authors conclude that:

Educational chances of foreign children being born in Germany or having entered primary education from the beginning are about the same as those chances of German children of workers;

Educational chances of foreign children who entered Germany at a later stage are still extremely small;

Only about half of all foreign children leave school with a completion certificate; and

Only one-quarter of all foreigners of the part-time compulsory school age, between 15 and 18 years of age, receive a full vocational training or attend schools at the secondary II level.

An analysis of the educational policy reactions during the 1970s led to the conclusion that the political parties as well as the overall educational planning bodies KMK and BLK were extremely reluctant to discuss educational problems of the children of migrant workers. This is not surprising: on the one hand, migrant workers do not belong to the voter potential, because they have no right to vote either at the Federal or at the Lander or community level. On the other hand, the educational policy consequences must always be seen in connection with the overall policy vis-à-vis migrant workers. In other words, educational measures can only be undertaken successfully if the overall problems with regard to the legal aspects of sojourn and work are solved; the German education system is per se not in the position of integrating the children of migrant workers into German society.

Within the context of this paper, it will be impossible to give any details about the implementation of administrative orders in the different Lander because, due to the cultural sovereignty of the Lander, the educational problems of the children of migrant workers are part of the Lander activities. We will concentrate here upon some administrative changes as they were laid down within the different recommendations of the KMK. Those were compromises--actions and reactions that were taken in view of the different situations in the Lander but also in the international environment. International pressure increased and should not be ignored. Besides the conventions within the framework of the United Nations System mentioned above, it should be noted that also the Final Act of Helsinki in 1975 dealt with the problem of foreign pupils. Furthermore, the Council of the European Communities became active in July 1977 and asked all member states to fulfill within a period of four years the following measures:

Introductory courses without fees that are adapted to the specific needs of the children and include teaching in the national language of the receiving state;

Training and further education of teachers who offer such a type of courses; and

Furthering of teaching the foreign children in their mother tongue and in civic education (the whole being coordinated with the overall education in German school institutions).

It should be mentioned again that the decisions of the KMK have the character of recommendations and therefore do not bind the individual

Lander. The problem is further complicated since there is not only the cultural sovereignty of the Lander, but there exist also diverging concepts with regard to an employment policy of foreigners in the different Lander that do not make it easier to solve the school problems of children of migrant workers. This is also clearly reflected in the different implementation measures of the Lander based upon recommendations of the KMK.

The KMK passed three recommendations in 1964, 1971, and 1976. Foreign pupils have the same rights and duties as German pupils with regard to full- and part-time compulsory school attendance until the age of 18. However, the double strategy of the KMK recommendations is rather ambivalent, if not impossible: on the one hand, foreign pupils should become part of the German education system so that they learn the German language, receive German graduation certificates, and are socially integrated "for the duration of their stay in the Federal Republic of Germany"; on the other, they are supposed to keep and improve the level of knowledge of their mother tongue and their cultural identity, which should allow them a reintegration into the education systems of their "countries of origin."

Preparatory classes were introduced in order to assist foreign pupils in learning the German language. Foreign pupils with a sufficient knowledge of German were supposed to enter normal classes; their proportion should not exceed 20 percent.

Although the idea of "national schools" for foreign students has been generally rejected, some Lander developed pilot projects that corresponded to a de facto realization of this idea. In some Lander, schooling in the mother tongue was left to the consulates of the "countries of origin."

Furthermore, it must be stressed that due to the density of foreigners in certain areas--especially in some districts of the big cities--the concept of integration according to the 20 percent clause could not always be implemented. However, as mentioned above, the educational authorities at the Lander or local level are forced to develop strategies of "muddling through" as long as the overall political and legal framework conditions are not clearly defined. The necessary consistent measures cannot be undertaken unless a comprehensive concept of Auslanderpolitik is still missing.

Although several attempts were undertaken during the late 1970s, a lack of consensus between the federal government and the Lander governments still prevailed and led to a "nonpolicy" of immigration in the Federal Republic of Germany.

V. Equality of Educational Opportunity: Specific Measures in the Federal Republic of Germany

There exist, as mentioned above, several possibilities of increasing the equality of educational opportunity, of implementing the right to education. In principle, three approaches can be distinguished, namely (1) political measures that lead to structural changes of the education system and/or to changes of the admission criteria for secondary and tertiary education, (2 public financial assistance schemes that support pupils and students from low-income groups, and (3) legal measures that further elaborate the rights to education.

The concept of "affirmative action," which goes along with such ideas as "positive discrimination" or "reverse discrimination," implies that one has to discriminate in order to equalize. So far, concrete affirmative action programs, being well known in the United States, do not exist in the Federal Republic of Germany. This does not mean that German policymakers are not unaware of latent and manifest discriminatory practices in education. But three reasons might help to explain possible differences between Germany and the United States:

1. One refers to structural differences in educational planning: the steering of educational systems in Germany is primarily not organized via "consumers" and "markets," but via highly centralized planning activities of the Lander.
2. The generally accepted welfare state notion in the Federal Republic of Germany ("social market economy") led to the establishment of a closely tied social network similar to other Western European countries and in contrast to the still rather

underdeveloped--or even rejected--one in the United States.

3. The minority problems, especially in the case of migrant workers, are not yet "visible," although they might occur--given the present economic constraints--in the very near future and lead to manifest conflicts.

The equality of educational opportunity discussion that took place in Germany during the 1960s centered mainly around the rather rigid German education system at the secondary level. It was argued that the particularly low participation rate of children from the working class was due mainly to the early selection processes after primary education. Therefore, the concept of the comprehensive school that allows for a greater "horizontal mobility" became the structural alternative. As mentioned above, the Gesamtschule did not replace the traditional system, which however changed in two ways: (a) the introduction of an "orientation level" weakened the former a priori streaming; and (b) the social demand for secondary education changed to such an extent that the Hauptschule is no longer the "main school" but a "residual school," which raises the question of abolishing it totally.[12] In turn, this also means that the Gymnasium of 1980 is no longer comparable with the Gymnasium of 1960. Therefore, the dichotomy of Gymnasium versus Gesamtschule must be given up in favor of a more differentiated analysis. In other words, further educational reform measures are necessary, but must be--due to the changes in enrollment ratios and participation rates--undertaken under a different focus.

Since 1972, pupils and students from low-income families can claim public financial support in order to continue education at the secondary II level and at the tertiary level. The Bundesausbildungsforderungsgesetz (BAfoG; federal law for furthering education) is based upon the principle of the social state (Article 20, 1 of the Grundgesetz) and is supposed to realize a de facto equality of life chances. Grants are offered to pupils, combined forms of grants and loans (to be repaid without interest charges) to students; the amount depends upon the net income of the parents.

In 1972, 225,000 pupils (31.3 percent of all pupils) received BAfoG grants; in 1980, the corresponding number of pupils was 490,000 (34.2 percent). In 1972, 270,000 students (44.6 percent of all students) received BAfoG grants/loans. In 1980, the corresponding number of students was 345,000 (35.6 percent).

Total expenditure of this scheme increased from 1.6 billion DM in 1972 to 3.7 billion DM in 1980. The scheme is financed by the Bund (65 percent) and the Lander (35 percent); it offers the federal government a "market-oriented," consumer-oriented strategy of intervention in matters of educational policy.

Although the data are incomplete, the general picture is obvious: in 1979, more than 30 percent of the BAfoG recipients came from the working class. Finally, it should be mentioned that foreign pupils and students also can apply for BAfoG grants/loans. However, the administrative regulations are rather complicated: whereas children with EC nationality (Italians and Greeks) have the same claims as Germans, the possibility of financial assistance for other foreigners depends upon the duration of stay (in the case of pupils, at least one of the parents must have been employed in Germany during the preceding three years). In 1979, 13,000 foreigners received BAfoG grants/loans (out of 770,000 recipients altogether). This percentage of 1.7 in 1979 was supposed to increase since the majority of the foreign pupils did not yet--due to the age composition--enter the secondary II level. However, in November 1982, the new federal government announced drastic changes of the BAfoG scheme. In the case of pupils, only those who must live outside their family homes can claim BAfoG grants. Since in 1982 only 15 percent did not live with their parents, it can be assumed that the BAfoG scheme will be practically abolished for pupils at the secondary II level.

In the case of students, the old combined BAfoG scheme of grants and loans will be changed into a pure loan scheme. The consequences are obvious: many students, especially from the lowest income groups, will be reluctant to assume a long-term debt in order to finance their education, which will negatively influence the proclaimed equality-of-educational-opportunity goal of the 1960s and 1970s.

Although slogans such as "equality of educational opportunity" and "education as a civil right" played a significant role during the "decade of educational reform" (1965-75) in the Federal Republic of Germany, the political meaning of basic rights to education still remained rather limited. In constitutional-legal terms, those slogans did not lead to a process of concrete codification of basic rights to education as social rights, although "external pressure" increased--due to the international codification of human rights instruments, most of which were ratified by the Federal Republic of Germany. In practical-financial terms, a dramatic backlash can be anticipated due to the announced changes of the BAfoG scheme.

Today, the Federal Republic of Germany is a de facto country of immigration where the majority of migrant workers and their families will stay permanently. This requires that the social rights as laid down and/ or practiced to the benefit of Germans must also be applied to foreigners. Basic rights to education must at least be formulated as basic norms and applied to all inhabitants, to Germans and non-Germans. This requires educational reform measures in terms of a more pluralistic and differentiated educational system, which should offer educational paths according to different individual needs and include the right of participation in all decision-making processes within the educational institutions.

Rist mentioned that "it is noteworthy that nowhere in the current discussions about the educational future of the foreign workers' children does one come across the concept of affirmative action" (p. 237). Some of the reasons for it were explained above. If the present federal government intends to apply more market-oriented schemes in educational finance, then affirmative action programs are even more urgent than before--because the present position of nonrecognition of the de facto immigration situation in Germany can no longer be held, and the built-in disadvantages of educating foreign children as "illiterates in two languages" must be removed through special programs in favor of them.

NOTES

1. The notion of planning is, of course, restricted to programming (preparation of plans).

2. Attendance at part-time vocational schools is compulsory until the age of 18.

3. Georg Picht. *Die deutsche Bildungskatastrophe. Analysen und Dokumentation*. Olten-Freiburg, Walter Verlag, 1964.

4. Ralf Dahrendorf. *Bildung ist Burgerrecht. Pladoyer fur eine aktive Bildungspolitick*. Hamburg, Nannen, 1965.

5. The Federal Republic of Germany became party to both Covenants, but not party to the Optional Protocol. This implies that citizens of the Federal Republic of Germany cannot submit "written communications" to the Human Rights Committee. The Federal Republic of Germany made, however, the necessary declaration under Article 41 with regard to the procedure for inner-state complaints--a procedure that provides for a complaint by one state party that another state party "is not fulfilling its obligations under the present Covenant."

6. The Federal Republic of Germany became party to this Convention, which came into force on May 22, 1962, and to the recommendation.

7. Under Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, States Parties (including the Federal Republic of Germany) undertake to prohibit and to eliminate racial discrimination with respect to the right to education.

8. All figures are from: Bundesminister fur Bildung und Wissenschaft. *Grund- und Struktur-Daten 1981/82*. Bonn, BMBW, November 1981.

9. This duration of stay is necessary in order to become a citizen of the Federal Republic of Germany. In 1979, about 35,000 foreigners became Germans. However, 25,000 of them came from Eastern European countries such as Rumania, the Soviet Union, Czechoslovakia, Poland, and Hungary. With the exception of Yugoslavia (about 4,000), only a very small number of persons from the "South" became Germans, namely, 340 Greeks, 951 Italians, 225 Spaniards, and 312 Turks.

10. In absolute figures, however, also in the case of these three nationalities, increases occurred (e.g., in the case of Greek pupils, from 26,500 to almost 51,000 during that period).

11. According to a recent survey, 8 percent of all foreign children of compulsory school age did not attend school. Among all Turkish children, the percentage reached almost 18 percent.

12. Because there is obviously the danger that the Hauptschule becomes primarily the school of the children of migrant workers.

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AFFIRMATIVE ACTION: THE YUGOSLAV CASE

Trivo Indjic

Yugoslavia was founded as an independent state of Southern Slavs in 1918, following World War I. Up until 1941, it was a monarchy with a highly centralized political and administrative structure and numerous internal tensions due to the unresolved problems of its ethnic, religious, and cultural minorities. Some ethnic groups--for example, the Macedonians --lacked basic national rights, such as the right to use their own language in schools and public administration. The concept of a federated Yugoslavia, put forth by all progressive political movements of Southern Slavs, was rejected in favor of a rigidly centralized monarchy; such was the notion of "one people with three names" (Serbs, Croats, and Slovenes). In the so-called Vidovdan Constitution of 1921, the right of Macedonians, Montenegrins, Muslims and other national minorities to a separate ethnic and cultural identity was not recognized. This conflict between national centralism and the tendency toward federalization of the country constitutes a distinctive characteristic of Yugoslavia and will long continue to represent the focus of the divisive forces within its framework.

Yugoslavia is also the site of diverse religious communities and influences: in the western half of the country, Catholics and Protestants are prevalent, while in the central and eastern regions followers of the Muslim and Eastern Orthodox faiths are more numerous. Religious intolerance and divisions have often had significant political consequences, particularly during World War II.

Various cultural communities coexist in the Yugoslav geographical and historical sphere. Alongside the traditional Slav peoples (Serbs, Croats, Slovenes, Mecedonians, and Montenegrins), there are other natives of subsequently formed cultural groupings (Albanians, Turks, Muslims), as well as numerous other ethnic minorities (Italians, Hungarians, Bulgarians, Rumanians, Ruthenians, Jews, Slovaks, etc.).

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The historical divisions--political and ideological--in addition to the intervention of the Great Powers in the Balkan Peninsula, and the religious and cultural conflicts, profoundly affected the peoples of Yugoslavia. The foundations for a new, republican, and federal Yugoslavia were set up in the course of World War II, in the common struggle against the Germans and other occupying forces and their collaborators, a struggle in which every 10th Yugoslav lost his or her life. The Constitution of 1946 declared Yugoslavia to be a federal republic from which all forms of ethnic, religious, or other discrimination would be excluded.

From that time begins the ethnic rebirth of all Yugoslav peoples and national minorities. Church and state were made separate, schools were removed from church jurisdiction, and all national languages were made equal before the law. Yugoslavia became a federation composed of six sovereign state republics and two autonomous provinces: Bosnia-Herzegovina, predominantly inhabited by Serbs, Muslims, and Croats; Montenegro, where Montenegrins constitute the majority of the population; Croatia, with Croats as a nation; Macedonia with Macedonians; Slovenia with Slovenes; Serbia with Serbs; and two autonomous provinces, Kosovo and Vojvodina, contributing to the composition of Serbia. The autonomous regions are territories where the members of national minorities predominate: Albanians, Turks, and Muslims in Kosovo, and Hungarians, Rumanians, Ruthenians, and Slovaks in Vojvodina. The term "national minorities" became interchangeable at the close of the 1960s with the term "nationalities." In this manner, it was sought to avoid the negative connotation of the concept of "minority" and to underscore the fact that those population groups in Yugoslavia, that in an ethnic and national sense form part of the populace living in other neighboring states, represent an active and equal factor within the Yugoslav community. That is, they enjoy the same ethnic, economic, political, and cultural rights as the major "nations" or peoples of Yugoslavia. The Federal Constitution of 1974 and the republican and particularly provincial constitutions of the same year define the numerous civil rights and freedoms of the diverse "nationalities" very precisely. Aside from the constitutional categories of "nation" (i.e., one of the more numerous ethnic groupings or national majorities) and "nationality" (a national minority), there also appears the term "ethnic group," a differentiation of which from the first two categories is insufficiently clear. As to the types and scope of the constitutional rights for these three categories of the Yugoslav population, there are no differences. There exists, in fact, only one distinction: as opposed to a "nation," neither a "nationality" nor an "ethnic group" can constitute a separate state within the framework of the Yugoslav federation, since they represent demographic fragments of peoples composing sovereign states beyond the borders of Yugoslavia. This distinction was particularly emphasized on the part of official circles at the time when Albanian separatists in Kosovo, in 1981 and 1982, demanded that their autonomous province be made a republic, that is, that it be accorded republican status in the framework of Yugoslavia. The problem with that resides in the fact that federal republics, as sovereign states, possess the constitutionally guaranteed rights to self-determination and secession.

Yugoslavia is also a multilingual community. The three most generally spoken Slavic languages are Serbo-Croatian, Slovenian, and Macedonian, in addition to the series of other languages of the nationalities. There are two separate alphabets in use as well: Cyrillic and Latin. The country does not have a single official language or script. All languages and scripts are equal before the law, in public administration, schools, mass media, and the like.

Article 170 of the Yugoslav Constitution of 1974 declares that every citizen is guaranteed his or her free expression of belonging to a "nation" or "nationality," the free expression of his or her ethnic culture, and the freedom to use its language and script. The citizen is not required to declare himself or herself a member of any particular nation or nationality, nor is he or she required to define himself/herself in terms of membership in one or another nation or nationality. Any propagandizing or imposing of national inequality as well as any incitement to national, racial, or religious hatred and intolerance is unconstitutional and subject to fine (Articles 170 and 203).

The principle of proportional representation for the nations, nationalities, and ethnic groups in the organs of power (from the federal Parliament to the local, municipal assemblies) was also declared in the constitutions of the federal bodies. In addition to the standard legal ways to defend the rights to an ethnic and cultural identity (the regular courts and the Constitutional Court), the constitutions of several federal bodies envisioned the formation of special organs, councils, or commissions that would be concerned with the protection or enactment of constitutional principles dealing with the equality of nations, nationalities, and ethnic groups.

There is no doubt that the postwar Yugoslav policy of national equality yielded positive results and successes in correcting injustices and violations, both historical and political, that had been going on in this part of the world for decades, even centuries. In this regard, the example of the Macedonian people and their culture is very illustrative.

For centuries, the Macedonians waged a struggle for independence and their national and cultural identity, which was threatened by the irredentist intentions of neighboring countries (Byzantium, Ottoman Turkey, Bulgaria, Greece, and, during World War II, even Italy). Toward the end of World War II, within the framework of the Yugoslav community of peoples, the Macedonian language was proclaimed, in 1944, the official language of Macedonia. That same year, the Macedonians adopted a modern orthography, established a series of national cultural institutions, schools in the national language, etc. Shortly thereafter, a modern Macedonian literature, opera, theater, radio, and television were created, a university and a Macedonian Academy of Science were founded (1967), a dictionary of the Macedonian language was published (1961), as was a history of the Macedonian people. There was a previously unseen enthusiasm of national and cultural rebirth, of a small people (according to the 1981 census, Macedonians in Macedonia numbered 1,281,195) hastening to catch up with what had been denied them for centuries.

To the Macedonian example could be added many others, particularly those that speak of the rebirth of national minorities in Yugoslavia

(Albanians, Hungarians, Rumanians). All of these are situations in which the consequences of historical and other social differentiation can and should be corrected by means of a policy of affirmative action.

That which is specific to the Yugoslav experience is the fact that here the political system has actively stimulated and promoted change in those situations that would otherwise be corrected by measures of affirmative action. Suffice to review the Yugoslav body of legislation to be convinced of this. Of course, this does not mean that in practical, everyday life there are no problems and conflicts in which measures of affirmative action would not find universal applicability. We shall limit ourselves to only a few examples in this regard.

In recent years, Yugoslavia has had serious problems with a strong current of Albanian nationalism and separatism in the autonomous province of Kosovo. In that part of Yugoslavia, according to the population census of 1981, live 1.6 million people, whose percentages of the total are represented as follows: Albanians, 77.5 percent; Serbs, 13.2 percent; Muslims, 3.7 percent; Montenegrins, 1.7 percent; Turks, .8 percent; and others, 3.1 percent. In prewar, monarchical Yugoslavia, the Albanian minority had no official national identity, nor schools, nor any other kind of cultural institution in its own national language. The Albanians were among the most impoverished and backward inhabitants of the country, their women subordinated to patriarchal power. In the initial years following World War II, the average life expectancy in Kosovo was 45 years; by 1980, that figure had been extended to 68 years. While in 1947 80 percent of the population of the province lived in a rural setting, the corresponding figure for 1981 was only 42 percent. The Albanians hold the record birth rate in Yugoslavia, even by international standards. In the last 10 years, their birth rate has gone up 27.4 percent, and in Kosovo 52 percent of the population is under age 19. After the war, 85 percent of the inhabitants of Kosovo were illiterate, and it was then that the Albanians got the first primer in their own language. Today, every third inhabitant of that province receives an education. The first university department in Kosovo was founded in 1960. During the academic year

1980-81, there were 47,284 students enrolled at the University of Pristina, the capital of Kosovo. In 1979, there was a total student enrollment in Kosovo of 130,000 (the equivalent of 16 percent of the available labor force), while at the same time, 165,000 persons were employed in the social sector of the economy (corresponding to 20 percent of the total available labor force). The gradual overcoming of economic and cultural backwardness in this region of Yugoslavia is accompanied by the national rebirth of the Albanians, who, as we said, have "nationality" status in Yugoslavia. The Albanians, in accordance with their number, are proportionally represented in all the political organs and institutions of the province. In practical terms, that means that they are the majority group in Kosovo. Proportional representation has helped the Albanians to free themselves in the shortest possible time from historical and hereditary inequalities and discrimination and to emerge from their former political, economic, and cultural ghetto. Along with proportional representation as a measure of national equality, measures of affirmative action were carried out in practice, despite their not having been anticipated by any legislative regulations.

Thus, at the University of Pristina (the only university in Yugoslavia that has all of its instruction in the Albanian language, with corresponding instruction in Serbo-Croatian for students of Serbian and other nationalities), the enrollment of Albanian students was stimulated by giving them preferences at the time of application. For each student representing another nationality, 3.8 Albanian students were enrolled. This ratio is also valid for the 1981-82 school year, prescribed by university administration. The same criterion holds as well for the admittance to student residences and for the granting of stipends and credits to study. Within the context of this quota system, Albanian women were given preference. Today, at Kosovo's university every fourth student is a woman, and women comprise 40 percent of the student body in the School of Medicine.[1] By means of such an enrollment policy at the university, three-quarters of the students in Kosovo today are Albanian.

Similar examples can be found in other areas in which the Albanians enjoy support and favor. The daily newspaper Politika writes that textbooks in the Albanian language are less expensive than those in Serbo-Croatian, despite the fact that all inhabitants of Kosovo set aside the same percentage of their earnings for the advancement of education.[2] The financing of certain cultural activities also favors those of Albanian extraction. In 1981, for example, the Albanian literary journal Jeta e re was granted a greater subsidy per number of copies published (416,666 dinars) than the Serbian journal Stremljenja (275,000 dinars) or the journal of the Turkish nationality, Cevren (170,000 dinars in all).[3]

In Kosovo, there have also been examples of restriction of employment/job access according to knowledge of the Albanian language or membership in the Albanian nationality, as well as examples of requiring bilingualism in job competition in order to be hired. In January 1982, a factory manufacturing electric batteries held a competition for 138 jobs and hired 133 Albanians and only 5 Serbs. In the Kisnica and Novo Brdo mines, of 1,588 workers hired over the past four years, only 15 percent of the total hired in the former were Serbs and Montenegrins, while in Novo Brdo the percentage was only 13 percent. In the region containing both these mines, the majority of the population is comprised of Serbs. This type of hiring policy is the reason they are migrating out of the area in increasing numbers.[4] There have been so many such instances that a number of non-Albanian Muslims in Kosovo have declared themselves to be Albanians since, as they explain, this would enhance their chances of employment, of being included in the academic quota or, simply, it would facilitate their upward social mobility.[5]

It is difficult to obtain data dealing with such examples since they are grudgingly made public. In the Yugoslav legal system, there are no explicit precedents for fostering programs of affirmative action, particularly with regard to reverse discrimination. Such programs are, therefore, most often the result of informal agreements of lower bodies of the administrative hierarchy or power structure. Their juridical weakness derives from that fact, in contrast with and opposition to the constitutional principle of the right of all to compete for public office under equal conditions and that all jobs are to be made available under conditions of equality.

In the case of Kosovo, the just promotion of the national and cultural identity of the Albanians wound up in exaggerations and abuses of the informally adopted measures of affirmative action. From 1968, the phenomenon of Albanian nationalism and separatism began to appear. Illegal political organizations were established that fought for Kosovo's secession from the Yugoslav federation and sought to have it made part of Albania. Some among these supported the notion of an "ethnically clean Kosovo," in which the Albanians would be the dominant group, particularly in the event of Kosovo's becoming a sovereign state of Yugoslav Albanians. The question was no longer, for example, why Pristina Television broadcasts the greater part of its programming in Albanian rather than in Serbo-Croatian, or why in the League of Communists of Kosovo the percentage of members of Serbian nationality in the leadership is less than its proportion in the membership of that ruling party.[6] The matter became an open and bitter confrontation of the Yugoslav federation with the escalating Albanian separatism in Kosovo. Rampant Albanian nationalism came to endanger the policy of national equality in Kosovo, even to endanger the existence of other nationalities. In the decade from 1971 to 1981, 57,059 Serbs and Montenegrins migrated out of Kosovo, and that trend remains today unabated. In the fall of 1981, at the University of Pristina, so few students enrolled for instruction in Serbo-Croatian that the continued existence of university instruction in that language was in doubt. During the first half of 1982, 1,929 Serbs and Montenegrins abandoned the capital of Kosovo, i.e., approximately 5 percent of the members of those ethnic groups living there. That means that 1 percent of the total number of Serbs and Montenegrins living in Pristina are migrating away from that city monthly. Kosovo is an example where some of the past wrongs done to the Albanians have been rectified, but where such preferential treatment has led to new wrongs.

Indisputably, in the Albanian case, preferential treatment, intended to correct the unjust situation created by previous policy, resulted in the strongest forms of reverse discrimination (according to Alan H. Goldman's definition). In contrast, however, the case of Yugoslav Gypsies unequivocably demonstrates the need for the government to implement certain measures of corrective preferential treatment.

Judging from the number of its Gypsies, Yugoslavia appears to be their major center of concentration outside of India. According to the recent population census (1981), the number of Gypsies in Yugoslavia--although findings are not as yet conclusive--totaled 148,604. According to the census of 1971, there were 78,485. The general consensus is that the recorded statistics do not reflect the actual number of Gypsies (the magazine NIN, June 7, 1980) because a number of them, due to their unresolved constitutional status, declare themselves as belonging to other nations and nationalities, as a phenomenon of ethnic mimicry. Nevertheless, the most recent census indicates above all a national Gypsy awakening as a consequence of their general emancipation. In Macedonia, the number of Gypsies in relation to the 1971 census went from 24,500 to 43,000. In Serbia, their numbers doubled, while in Vojvodina and Montenegro their totals increased 2.5- and 3.5-fold respectively. The general opinion is that this increment cannot be ascribed to a high natural population increase among the Gypsies, but rather to the fact that they are more frequently making public their spontaneous national feeling.[7]

Today, the Gypsies in Yugoslavia are fighting to have "nationality" status officially accorded them. The fact is that the status of the Gypsy is not expressly regulated in the constitutions of the republics and provinces, which comprise regulations regarding "ethnic groups." The Federal Constitution of Yugoslavia does not recognize the category of "ethnic group," but rather only the categories of "nation" and "nationality." The Yugoslav Constitution does not affirm who these nationalities are in Yugoslavia, but, conversely, the constitutions of the majority of the republics and autonomous provinces explicitly enumerate the individual nationalities, among which the Gypsies are nowhere to be found.

The Serbian Constitution, for example, in Article 194 guarantees the freedom of expression of membership in an ethnic group, the freedom to practice their culture and use their own language and script; and it provides for the establishment of an organization to ensure these rights. All constitutions at the republican level uphold these rights as individual rights of those belonging to ethnic groups, and not as rights of the collective, which would be the case for rights of a nationality.[8] The statutes of some municipalities that have members of ethnic minorities living within their jurisdiction contain detailed regulations regarding the rights of the members of these groups. For instance, a statute of the municipality of Tetovo (in Macedonia) includes a paragraph regarding the program that is broadcast over Radio Tetovo in the Gypsy language. The said statute states too that the municipality ensures to the members of ethnic groups living on its territory their proportional representation in corresponding bodies of municipal government.

The Gypsies of Yugoslavia, not merely numerically but in keeping with their characteristics, can be assigned to the category of "nationality"--such is the position and the demand of Gypsy intellectuals and organizations. There is no reason not to support this position, even more so if one takes into account the recent positive gains of the Yugoslav policy of equality for nations and nationalities. A change in constitutional status for the Gypsies would grant them much greater political and national identity, a more speedy resolution of their social problems, and would afford them a broader cultural self-affirmation.

In the Report of the Yugoslav Federal Presidency (No. 414, January 1981), it says that "all indicators dealing with the socioeconomic position of the Gypsies in Yugoslavia (employment, income, housing, education, etc.) point to the fact that their problem remains a serious basic social issue, since they belong to the poorest sector of Yugoslav society. In the large Gypsy families (average size; seven or more members) only one or, at the most, two family members have a steady job. And those who are employed, due to their low educational level and insufficient professional qualifications, most often hold the least remunerative jobs."[9] In the town of Leskovac, for example, of 5,180 Gypsies, only 560 are employed; in Pristina, of 6,740 Gypsies, only 634 work; and in Bujanovac, of 3,500 Gypsies, only 50 hold jobs. The political organs in Serbia have shown the greater number of Gypsies to belong to the category of "socially endangered persons."[10] In one report, it states that Gypsies in the municipality of Cakovec, Croatia--including the women and children--wander en masse through the villages, scavenging food from the garbage cans, and often resorting to stealing crops, for lack of the basic means of subsistence. They live in mud-covered willow hovels. Such territorial segregation of Gypsies exists even in the most highly developed Yugoslav republic, Slovenia. These Gypsy settlements lack roads, running water, sewage systems, and often even electricity.[11]

For Gypsies, the way out of this situation lies in more education and higher employment. However, in order to be employed, they have to be literate, since almost all employers demand at least an eighth-grade education, but the majority of Gypsies can not fulfill this job requirement (the Constitution does not state that schooling is required in order to obtain employment). Thus the circle of poverty closes. The living conditions of Gypsy children make it necessary for them to "prepare for life" as early as possible, that they do whatever they can to help their families (begging, manual labor, menial part-time employment, etc.). For this reason, these children perform more poorly in school or drop out early. And those children that manage to enter school find themselves in an alien world. The schools they enroll in have instruction in a different, majority language. That is to say, the Yugoslav Gypsies do not have schools in their own language. Without a good knowledge of the language of instruction, Gypsy children are handicapped in advance. They are often sent to preparatory or specialized departments of the school and, in doing so, separated from the other children. In addition, it is a rare occurrence when a Gypsy child attends a preschool institution or kindergarten.

In the case of the Yugoslav Gypsies, therefore, the techniques and methods of an affirmative action program would be of vital import. The administration should be pressured and urged to reach a resolution on the Gypsies' serious problems. Not only would it be a case in which preferential treatment would rectify past wrongs, but it also would aid in the creation of equitable prospects for all. Accordingly, it is difficult to accept the point of view expressed by Svetozar Tadic, president of the Council on Interethnic Relations for the Socialist League of Serbia (a popular-front organization), who states that "there is no need to speak of a specific Gypsy question; neither is there any need for, nor can there be, any particular approach to the problem" since in Serbia "all are equal and enjoy constitutional rights."[12] But this opinion is contradicted by another--one of the Gypsies themselves. As distinguished Yugoslav Gypsy intellectual Said Balic (present president of the World Organization of Gypsies) explicitly states: "It's clear that the Gypsies themselves cannot muster sufficient forces to effect their own complete equality in everyday life," adding that the Gypsies unquestionably need the help of political organizations of social emancipation.[13] In the absence of juridical and enforcement programs of affirmative action, Gypsy volunteer organizations (the so-called Gypsy associations) attempt, in collaboration with local administrative organs, to change the current state of affairs for the better.

The Gypsy associations are volunteer national organizations that assemble Gypsies with the aim of furthering the educational, cultural, and social status of Gypsies. They began to be formed when the Gypsies produced their first generation of intellectuals and active public employees, in the 1960s. These associations did a lot for bringing Gypsies together, for their national and cultural self-affirmation. They have functioned, however, more as a traditional pressure group than as a part of the institutional mechanism of the Yugoslav political system. Thanks to Gypsy intellectuals in Serbia, beginning in 1974 there have been regularly organized festivals of Gypsy cultural achievements, linking 40 cultural-artistic Gypsy associations. These associations have 6,500 amateur artists and about a hundred Gypsy writers. They are a center of ethnic and cultural emancipation of the Gypsies.

As long ago as 1947, a Gypsy intellectual in Yugoslavia published a dictionary of the Gypsy language; and in 1980, in Skopje (Macedonia), the first grammar text of the Gypsy language was published, written in the Gypsy alphabet, in an edition of 3,000 copies. Although this first edition is already sold out, its author had to wait six years for publication for lack of funds.[14] In 1981, the world's largest anthology of Gypsy poetry was published in Belgrade, and the Yugoslav Gypsies also have plays written in their language. All of these are, nonetheless, individual efforts. The broad support of the entire Yugoslav society is necessary, since the Gypsies still do not have printed works in their own language, schools in their own language, or newspapers in their language. Up until now, only Radio Tetovo and Radio Belgrade (Studio "B") have a daily half-hour program in the Gypsy language, and these are more of an experiment than a permanent solution. The paper The Gypsy Voice has ceased publication, due to lack of funding.

Moreover, there are a small number of Gypsies who are active in the administrative apparatus. One Gypsy activist from Nis (Serbia) emphasizes, for instance, that of 12,000 Gypsies in Nis, they have not one delegate on the municipal assembly, on the executive bodies of political organizations and associations. "The situation is similar in many other places, and that's also how it is at the republican and federal levels."[15] The Gypsy association in Pirot (Serbia) has a membership of some 6,000 and they do not even have a place to hold their meetings. The same situation exists in Vranjska Banja (Serbia), where 2,000 Gypsies live.[16] Many Gypsy associations (of which there are 80 nationwide) operate under impossible conditions.[17] Of the total number of Gypsies in Yugoslavia, only about a hundred are studying at the university level.

The example of the Gypsies drastically points to the urgent need for a program of affirmative action, even in those countries that have constitutionally declared the complete equality of all peoples and national minorities and have eliminated racial, religious, and social discrimination. Constitutional principles are one thing, while their practical application is a far more complicated matter. Practical life does not allow us to be lulled into complacency by constitutional rhetoric, even when we are dealing with the constitution of a socialist country. The fact that the plight of the Gypsies is not unique in Yugoslavia can be seen from the case of those Yugoslavs who, at the time of census-taking, choose to declare themselves as "Yugoslavs."

In Yugoslavia, according to official records, there exist Serbs, Slovenes, Croats, Albanians, and a series of other nations and nationalities, but "Yugoslavs" do not exist either as a nation, a nationality, or as an ethnic group. According to the population census and the statistics, they are treated as "nationally undefined." The Yugoslav Constitution and the documents of the Communist League of Yugoslavia (the ruling, and the only, party in the country) do not recognize "Yugoslav" as an ethnic label, as the denomination of a people or as a supranational category.[18] In spite of that, there is a constant increase in the number of people in Yugoslavia who define themselves as "Yugoslavs." The 1971 census shows 273,077 Yugoslavs, while the last one, that of 1981, records 1,219,024 Yugoslavs. That is 5.4 percent of the total population of Yugoslavia. Most often those who declare themselves as "Yugoslavs" are those who are offspring of ethnically mixed marriages, but there are also those who consider ethnic distances in Yugoslavia to be minimal and who think that traditional ethnic tensions can only be overcome by a feeling of belonging to one vast community. However, this group of the Yugoslav population is all too often accused of promoting unitarianism, centralism, hegemony, or the forcible integration of those independent components of the Yugoslav federation. They are accused of being the creators of a supranation that seeks the mandatory assimilation of other Yugoslav peoples and nationalities, etc. There are more than a few Marxists who indicate that the existence of "Yugoslav" as a nation, supranation, internation, or any other ethnic formulation is "unscientific," "un-Marxist," and the like. Those who define themselves as "Yugoslavs" defend their right to an ethnic specificity, to be Yugoslavs; and they demand the right to and dignity of their self-classification be acknowledged.[19] In any event, the debate between them and their opponents continues and, apparently, will last for a long time.

We personally can see no reason that those who declare themselves to be Yugoslavs should not be accorded "nation" or "nationality" status, with all the constitutional rights that correspond to those categories (including the right to proportional representation in the organs of administration or the right to the creation of their own national institutions). Ethnic processes are not static, to be completed once and for all. The ethnic homogenization of Yugoslavia, mixed marriages, the effect of internal migration, the desire to transcend narrow regional, ethnic, or linguistic boundaries, are dynamic factors of a developed, economically and politically integrated society such as that of Yugoslavia. It is for this reason that we believe the recognized positive experiences of the affirmative action program should apply.

Other groups that do not enjoy any constitutional status in Yugoslavia are the Ukrainians (approximately 13,000) and the Vlachs or Aromanians (32,071). In 1890, the Ukrainians settled in Bosnia, and from there they spread to other regions of the country. They already had a strong national consciousness upon their arrival, and even today they call themselves Ukrainians and speak Ukrainian. Related to them, the Ruthenians possess nationality status in Vojvodina, and the Ruthenian language is one of the five official languages of that province. And while the Ruthenians have schools in their own language, their own radio and TV program, their publisher and press, the Ukrainians are still deprived of those advantages and frequently treated like a branch, an extension, of the Ruthenian nationality. The Ruthenians came to the Balkan Peninsula in 1746 from the northeast part of the former Austro-Hungarian Empire (what today is eastern Slovakia). The Ruthenians kept their language and the name of Ruthenians, although in their ancestoral homeland, Czechoslovakia, they are not recognized as a national minority. Despite the ethnic and linguistic similarity of those two groups, the differences between them are clear. Since the Ukrainians are members of an ethnic group with unfavorable status, certain elements of protective discrimination could be applied to their benefit.

The Vlachs or Aromanians are remnants of Roman settlers who came to the Balkans prior to Slav colonization. Even today, they have conserved their language and a consciousness of their ethnic identity. They have no schools in their language, no press, cultural institutions, or the like. Therefore, their integration in society is made significantly more difficult, as in the case of the Gypsies. Systems of preferential treatment characteristic of affirmative action should be applied to alleviate their plight.

From all the examples mentioned, we can see that Yugoslav society is a conflictive society, despite its pretensions to ideological and political homogeneity. The constitutional category of proportional representation of its ethnic groups in all spheres of public and political life, as well as the proclaimed civil rights and freedoms for all, or the protection against all forms of discrimination, in no way means that the present situation is totally satisfactory. The constitutional norm with regards to proportional representation is at times not attained. For instance, in Croatia, the members of nationalities make up 2.3 percent of the total population, while they are only represented by 1.9 percent of the delegations to the municipal assemblies, 1.4 percent of those in municipal executive bodies, and only 0.5 percent in administrative organs at the municipal and republican levels.[20] As a result of its ethnic composition, it is understandable that Yugoslav society is sensitive to all forms of "enumeration" and estimates based on an ethnic criterion. One could say that the matter of interethnic relations and their reflection upon the political system, upon the distribution of ethnic groups in the power structure, upon economic or cultural life, is a taboo subject, judging from the absence of serious sociological analysis. In Yugoslav specialized literature, there are no works on affirmative action nor any discussions on positive discrimination. As we have noted, the constitutional system does not recognize the category of preferential quotas for any disadvantaged minority. The official policy of "Brotherhood and Unity" leaves the practical correction of constitutional principles to the local administration or to the sole political organizations recognized by the Constitution (the League of Communists and the Socialist Alliance). Thus, the only existing forms that in a way resemble affirmative action programs could be found at the level of the local organs of government.

We hope that the undeniable need for a program of affirmative action, even in those societies that are ideologically and politically monolithic, has been demonstrated by our analysis.

NOTES

1. Cf. Politika, June 17, 1981; NIN, December 21, 1980, and April 4, 1981.

2. Politika, January 7, 1982.

3. Politika, January 18, 1982.

4. Cf. Politika, June 27, 1981, December 2, 1981, and January 8, 1982; Borba, June 25, 1981; NIN, July 18, 1981.

5. NIN, June 14, 1981.

6. Borba, June 13, 1981, and February 5, 1982.

7. It is assumed that there are about 1 million Gypsies in Yugoslavia (Borba, June 21, 1982). Cf. NIN, February 21, 1982, and May 17, 1981; Ilustrovana politika, June 9, 1981; Saopstenje SZ statistiku, no. 39, February 19, 1982.

8. Rajko Djuric in NIN, July 13, 1980, and March 1, 1981.

9. Komunist, November 16, 1979.

10. NIN, July 13, 1980.

11. NIN, July 13, 1980; Intervju, June 25, 1982.

12. Politika ekspres, February 27, 1980.

13. Politika ekspres, April 12, 1982.

14. Politika, January 14, 1980; Vecernje novosti, September 30, 1980.

15. Sait Balic in Politika, December 13, 1979; Dragoljub Ackovic in Intervju, June 25, 1982.

16. Sloboda, March 14, 1981; Vranjske novine, March 6, 1981.

17. Politika, December 13, 1979.

18. See Declarations in Politika ekspres, March 23, 1981, and February 7, 1981; also NIN, July 27, 1980.

19. NIN, January 11, 1981; Politika, May 31, 1982.

20. Borba, September 24, 1980.

PERU: AFFIRMATIVE ACTION FOR THE MAJORITY

Susan C. Bourque

The economic and cultural realities of Peruvian society make this country's affirmative action policies an important instance of the variation found in Third World nations. The Peruvian case underscores the problems of implementing affirmative action in nations suffering from severe economic underdevelopment. Ultimately, Peru demonstrates the dependence of such reforms upon both the commitment and political skills of a nation's leadership, as well as upon the stability and health of the nation's economy.

The issue affirmative action must address in Peru--and in many Third World countries--is the inequality of the majority and what the state can do about it. Affirmative action in this instance requires a more encompassing definition, to wit, government policies adopted to promote improved access to resources such as land, education, and legal rights, for those presently disadvantaged.

Thus the policies associated with affirmative action in the United States--quotas, improved recruiting, goals and timetables, revisions in criteria for hiring and promotion, internal compliance officers and court challenges--do not easily translate to the Peruvian situation. Similarly, Peruvian patterns of ethnic identification, political and economic power, as well as strategies of ethnic mobility, offer marked contrasts to the patterns found in Malaysia and India.

Peru is both ethnically and geographically diverse. The population (17 million in 1981) is unevenly distributed in three widely varying

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regions: the coast (50 percent in 1982), the sierra (the mountains, 39 percent), and the jungle (selva, 11 percent). Roughly speaking, ethnicity parallels geography with mestizo and white populations predominating on the coast, Indian peasants and mestizos populating the sierra, and tribal forest Indians and hunters and gatherers in the jungle. Substantial internal migration has somewhat affected this pattern: both sierra and coastal residents trickle into the jungle as economic opportunities develop there, and rural Indian peasants migrate to the coastal cities, primarily Lima and Chimbote. Migration from the sierra has dramatically increased in the past 40 years, reaching its peak during the period 1961-72, declining somewhat in the period 1972-81. During this time, the population of the sierra has dropped 26 percent. Approximately 75 percent of Lima's population was born outside that city. In the Peruvian census of 1972, 72 percent of the population listed Spanish as their native tongue and 26 percent listed Quechua or Aymara, the language associated with the sierra Indians.

Inequity in Peru is marked. One recent estimate put 80 percent of the population in the lower class, which is composed of a substantial range of occupations.[1] In the rural sector, this includes landless laborers, ex-peons, comuneros (members of peasant communities), and in the urban sector, street vendors, domestics, industrial workers, enlisted and noncommissioned military, and police personnel. In short, the lower class includes an economic spectrum widely varying in interests and concerns. What they share is low income relative to the middle- and upper-class minorities. Three-quarters of Lima's population lives in squatter settlements where electricity and piped water have only recently become available and where people are chronically underemployed or unemployed, and when employed concentrated in the lower levels of the service sector.

In this paper, I discuss some of the policies Peruvian governments have developed over the past 20 years to deal with the inequity of the majority, contrasting the first regime of Fernando Belaunde Terry (1963-68) with the revolutionary military government of Juan Velasco (1968-75) and Morales Bermudez (1975-80). For both periods, I address three specific concerns: (a) policy innovation and its motivation, (b) the complexities of the implementation process, (c) intended and unintended outcomes on Indian peasants and women.[2] The evidence from Peru suggests the difficulty of implementing affirmative action under conditions of economic uncertainty and decline. Reform policies initiated in the first years of the military government are all severely curtailed in the ensuing years as resources become tightly restricted. This underscores the critical role of the state in directing affirmative action efforts, as well as an important restriction upon its implementation of these policies.

The Changing Role of the State and Affirmative Action

In large parts of the world, the state's major concern is to control structurally subordinate populations. Affirmative action is significant because it represents an instance in which the state appears to be developing channels to afford greater access to resources for its most disadvantaged citizens, or for groups of citizens in its most disadvantaged strata. Understanding the circumstances under which a government comes to adopt such policies, as well as the outcome of those policies, are central concerns of contemporary political science.

Over the past 20 years, the Peruvian state has both increased its role in directing Peruvian society and turned its attention toward disadvantaged groups. The scope of government activity has broadened, involving the state in provision of infrastructure (roads, transportation, dams, irrigation) and in an expanded role in the economy (including the state-controlled petroleum and fishing industries, marketing and agricultural enterprises). The state has also addressed central problems of social equity and social justice through experiments in agrarian reform, education, rural development, and the expansion of women's participation.

Government efforts to deal with questions of social justice and to define routes for its attainment constitute that aspect of policy considered affirmative action, that is, those areas in which the state has developed policies to improve social equity through the use of state resources. Affirmative action in Peru has been pursued through legislative and executive programs, through policies defined and implemented by the state, and through redirecting or reorganizing private or nonstate entities and resources toward those ends.

In defining and implementing affirmative action policies, governments have had to confront two central and complex issues: (1) which groups are to be the recipients of affirmative action, and (2) toward what goal should state action be directed? A second phrasing of these issues might be: What models for affirmative action have Peruvian governments adopted? What has government leadership hoped to achieve? How have policies fit into the larger patterns of social change? What have been the responses of recipient populations to national initiatives?

In Peru, the problem of inequality has been addressed by every administration since the early 1960s. Widely diverse political leaders have attempted policy innovation and focused public resources and energy in attempts to cope with the most glaring forms of inequality. Their experience demonstrates the difficulties of defining and implementing affirmative action.

Historically, Peruvian governments have been faced with the question of how to achieve national integration in a population composed of a fluid range of Indians, mestizos, and Caucasians.[3] Any such scheme implied some attention to the substantial economic and cultural gulfs between the ethnic and economic groups in Peruvian society. Most recently, this analysis has included the disparity between men and women in their opportunities and circumstances.

Divisions in Peruvian society are marked between the modern and traditional economic sectors, between geographic regions, between ethnic groups, and between the sexes. Inequity is both severe and distributed in such a fashion as to make policy development a nightmare. Webb reports "an extreme of overall inequality." The distribution of personal income by decile indicates a ratio between top and bottom deciles of 49:1. Furthermore, the lower six deciles receive only 17 percent of the national income, while the top decile receives 52.8 percent; of that top decile, the upper 5 percent receive 43 percent and the top 1 percent 30.5 percent of the total national income.[4]

More important in terms of policy, any given social sector--such as the city wage earner or even the highland peasant--may include both very wealthy and very poor individuals. Webb points out that the lack of correspondence between income strata and other economic and social groupings makes redistributive policies extremely difficult. Moreover, policies directed at helping the poor in one region may increase the difficulties of the poor in another. For instance, he notes that higher prices for sierra-produced potatoes increase the cost of food for the urban poor. The diversity of incomes by geographic regions and occupational groupings is an important aspect of government planners' difficulties in developing affirmative action programs. Not only must they decide who within a particular region is to be given the benefit of government programs, but they also must determine how assistance to any selected group affects others with comparable and competing claims. This becomes a more difficult process when the state is heavily and directly involved in the development planning for society as a whole and there are limited resources to meet demands for state action.

Ethnicity, National Integration, and Affirmative Action

Central to any plan for national integration or affirmative action policy in Peru is the question of what is to be done with the rural Indian sector of society? When the Spanish conquered Peru (1532-35), they took charge of the remainder of the Inca empire, a nation estimated at between 4.5 and 3.2 million people.[5] This was a diverse population of groups conquered and consolidated into a political unit by the Incas only 100 years prior to the arrival of the Spanish.

The history of the sierra Indian population has been that of a severely dominated group. Indian identity has been strongly associated with assumptions and claims of collective ethnic inferiority by the dominant groups. Non-Indians (i.e., _mestizos_ and Caucasians) have maintained Indians in structurally subordinate positions through monopolies of the national government and economic system, through labor policies phrased in ethnic terms, and through steady encroachment on Indian lands. Indians were reduced to an auxiliary labor force to be mobilized for seasonal labor on coastal plantations or, alternatively, restricted to peon status on highland haciendas or to indigenous communities to produce tribute and agricultural surpluses for urban centers.[6]

The newly independent Peruvian state first attempted to achieve integration by both abolishing exploitative labor practices and by attempting to break up Indian communities "to convert Indians into yeoman farmers."[7] Unfortunately, 19th-century liberal policies facilitated the encroachment of mestizo plantation owners on indigenous community lands. The mestizos' dominance was insured by their facility in Spanish, the language of the legal system, and by the termination of special protective policies for the Indians.

It was only in the 20th century, under the influence of the pro-indigentista movement inspired by Manuel Gonzalez Prada, that the state began to intervene actively on behalf of the Indian population. The Constitution of 1920 established the legal existence of the Indian community and assumed some state responsibility for the well-being of the Indian population. The Constitution of 1933 reaffirmed the state's obligation "to protect Indian lands and insure the integrity of the Indigenous community." It also provided a mechanism for the legal recognition of Indian communities, insuring legal status to those communities officially registered (Davies, 1974; Dobyns, 1964).[8]

The extension of roads and a national school system into the rural areas proved to be important factors in changing ethnic relations. The expansion of schools, which began in the late 1940s, facilitated access to Spanish literacy and provided a wider exposure to the norms of mestizo life. The extension of road systems and the gradual commercialization of agriculture allowed ethnic mobility to those born as Indians and desiring to change that identity.

The pattern of ethnic identification that emerged in Peru is one in which identification as an Indian is a movable and changeable category. Cross-regional migration may be accompanied by an individual's acquisition of mestizo identity. Indians can become mestizos by adopting Western dress, by learning to speak Spanish, by changing occupation or by changing residence, usually moving from the sierra to the coast.[9] Van den Berghe and Primov stress the frequency with which this occurs by noting "tens of thousands of Peruvian Indians become mestizos every year."[10]

This pattern of ethnic fluidity and mobility makes an important contrast with Malaysia and India. Ethnic passing in Peru does not require a change in religion or rejection of one's family of origin. Most sierra Indians are normally Catholic and there is an overlay of Catholicism in many rural rituals. Similarly, Indian families often view the ability of a son or daughter to make a life in Lima or on the coast as a positive expansion of family opportunities. Parents often make considerable sacrifices to allow their children that opportunity. For policy-makers, the issue becomes--given the fluidity of ethnic identification and current opportunities for ethnic mobility--should affirmative action by phrased in ethnic terms?

The term indio has such a negative connotation in Peru that it is now seldom used, except as disparagement. Over time, campesino has come to substitute for it. Campesino might be loosely translated as "peasant," but it is used to include widely varying types of peasants, rural proletarians, sharecroppers, and even miners.[11]

This is not to imply that ethnic distinctions disappear in Peru. Rather they are contextual. Individual mobility from Indian or campesino to mestizo is dependent to some extent on other people's willingness to accept one's ethnic claims.[12] Current observers of ethnic identification patterns in Peru stress the confusion and imprecision in the overlap between Indian, mestizo, and Caucasian. Fuenzalida argues that "at the local level the rigidity of relations between the three levels (Indian, mestizo and white) is dependent upon the degree of isolation of the community. Thus as Peru is a heterogenous nation there is a wide spectrum of situations from extreme segregation to extreme fluidity." For the rural sierra closest to the coast, and for individuals with access to the coast, opportunities for ethnic mobility have accelerated.[13]

To appreciate what this has meant on a national scale one need only recall that the Peruvian population has shifted from 60 percent rural in 1940 to 60 percent urban in 1981. For many of the individuals involved in this notable population shift, geographic relocation brought with it the possibility of a new ethnic identification.

Given the reality of an ethnically stratified system and ethnic mobility, what have been the affirmative actions of governments toward the rural Indian sector of Peruvian society? What policies have recent governments adopted? What has motivated those policies? And what has been their effect?

Affirmative Action Policies and Programs

While the need for national integration to achieve Peruvian development would surely be identified as a major current in the philosophy guiding government affirmative action policy, social fear of the Indian or the rebellious campesino has also shaped current governments' perceptions of the need for more effective policies. Davies, writing of Indian integration policy up until 1948, notes the "fear of bloody Indian revolts" has characterized the response of white and mestizo Peruvians since the colonial period. He also notes that politicians not only used that fear to further their own ends, they often shared it.[14] In contrast to the situation in Malaysia, the Indian majority in Peru never achieved political power. Sporadic Indian and peasant revolts occurred, but these did not translate into effective sustained political participation, let alone political control.

Despite the significant population and ethnic shift noted above, social fear continues to motivate government action toward the campesino population. The peasantry is still viewed as the source of a number of the development problems facing Peru. In the rural areas, their poverty is believed to make campesinos easy marks for political agitators.

Peasant participation in invasions of hacienda land and the guerrilla movements in the mid-1960s aroused a fear that disorder might spread beyond government control. Such concerns helped the military decide to intervene in the political process in 1968. Similarly, scarcity of land[15] and lack of skills are deemed to be the major factors that push peasants into the overcrowded center city slums and urban land invasions. By the late 1950s and early 1960s, both private and public groups had begun to seek ways to prevent peasant radicalization. This implied confronting the dire conditions in the rural sierra and developing programs aimed at alleviating or eliminating those conditions.

Policies Under Belaunde (1963-68)

When Fernando Belaunde Terry was elected to the presidency in 1973, he appeared to many Peruvians to be the dashing, courageous, and energetic reformer that the nation desperately needed. Peruvians identified Belaunde's party, Popular Action, with a non-Marxist, nationalistic, developmentally oriented ideology. Belaunde talked about the "Conquest of Peru by the Peruvians," by which he meant the opening up of the riches of the Amazon jungle through the construction of a network of highways that would also foster the integration of the coast and the highlands. This was a development formula based on expanding resources and thus made it theoretically possible to imagine achieving social justice without conflict over redistribution.

During this period, social fear certainly did not disappear as a factor motivating government policy toward the rural Indian population. Land invasions by campesinos had preceded Belaunde's election, prompting the promulgation in 1964 of the first agrarian reform law. The law was specifically designed for the rural areas worst hit by invasions. Two months after his inauguration, 200,000 hectares were invaded in one sierra department and 40 communities occupied lands in another.[16]

Popular Cooperation. In recognition of the need of the government to act affirmatively with the problems in the rural sector, Belaunde put into action a self-help program entitled Popular Cooperation. The scheme allowed the central government to provide technical assistance for local development initiatives. The program was ideologically and organizationally based upon utilizing the surviving remnants of the indigenous community tradition of cooperative public works.

Popular Cooperation concentrated on road, school, dam, and community meeting hall construction. In its first year, 2,600 kilometers of road, 500 schools, and 2,000 community buildings were completed. The response of local communities who received technical assistance or materials was positive. At the same time, there was a widespread belief among peasants that ties to Belaunde's Popular Action party played a key role in determining which communities received help and how extensive government assistance would be. This perception was shared by members of the congressional opposition who correctly identified the political potential of such patronage. When Popular Action proved successful in the 1963 district elections, the opposition moved to cut off Popular Cooperation's funding, essentially ending the program.

Nevertheless, the impact of Popular Cooperation was striking. The program affected the most marginal areas of Peru, the indigenous communities, providing them with new public services and more extensive ties to the national political system.[17]

The Agrarian Reform Law of 1964. A second affirmative action toward the rural sector was the passage, in 1964, of Peru's first Agrarian Reform Law. Peru's highly diversified and stratified agrarian sector makes it difficult to implement adequate agrarian reform. Rural sierra land-holding and use patterns vary substantially; Indians live both as peons and sharecroppers on haciendas, at times in semifeudal relationships and at times exercising considerable autonomy. About 40 percent of the rural population in the sierra is located in indigenous communities. These communities vary in size, degree of economic stratification, and in the level of antagonism between themselves and neighboring haciendas and other indigenous communities. Lengthy and costly suits over disputed land have engaged the energies and monies of communities throughout this century.[18] In many communities, substantial differences in land-holding exist and poor peasants work as day laborers for wealthier peasants.

The situation for coastal agriculture is equally complex, with a variety of tenant farmers, permanent laborers, and temporary workers all associated with coastal plantations. Deciding who has a claim on land in a situation of land scarcity is a difficult task, even for the best-intended and best-constructed laws. In addition, government officials feared agricultural production would drop as a result of any substantial redistribution of land. In particular, there was concern about the impact of an agrarian reform on the highly productive coastal sugar enterprises that made important contributions to the national economy.

In the case of Belaunde's land reform, another political factor intervened. The opposition's majority in Congress effectively blocked application of the law on the coastal commercial plantations--the seat of the opposition's strongest political support from the unionized workers in those sites. The workers on the sugar plantations of the north coast were among the best-paid workers in Peru. Many of them feared an agrarian reform would adversely affect their situation.

Whereas the actual amount of land distributed and the type of enterprise affected was limited under the 1964 law, Belaunde's reform clearly set a precedent. Henceforth, the state might act affirmatively to redistribute a most valuable resource to alleviate inequity in the rural sector.

Educational Reform. During the first Belaunde administration, Peru experienced broad educational reform. Much of this represented affirmative action for the least advantaged; illiteracy was substantially reduced and primary school enrollment increased. Belaunde introduced free education at the secondary level, and government expenditures for education jumped from 19.9 percent of the budget in 1962 to 28.8 percent of the 1965 budget and 30 percent by 1966.[19]

Schools and education are viewed as a most important route of social mobility by many rural *campesinos*, but their approval is qualified and they are critical of flaws in the educational system. *Campesinos* understand that the school is an essential institution for gaining access to the wider society, but schools, and the mestizo teachers who instruct in them, often communicate quite negative evaluations of indigenous culture and campesinos.[20]

As schools expanded in the rural areas and primary education became more readily available, little effort was made at the national level to infuse a pro-indigentista or cultural-pluralism component into the curriculum. The assumption was that schools were important elements in furthering the integration of the indigenous population, but integration would have to be on terms that fostered acculturation to mestizo norms and language.[21]

Language posed an important barrier for the Indian population, and the drop-out rate for Indian children, especially girls, remained high. Transition to schools and advancement through the grades are closely tied to the ability of the children to learn Spanish. In addition to the language barrier, a number of studies indicate that campesino parents doubt the willingness of mestizo schoolteachers to educate their children.[22] Parents' antagonism toward the schoolteachers, who are often viewed as outsiders in the community, serves as an important brake on what can be accomplished through affirmative action programs that depend upon the classroom and the schoolteacher for effective implementation.[23]

Under Belaunde, in addition to the substantial expansion of schools, there were some initial attempts to improve knowledge and understanding of indigenous languages and to promote the use of the native language as a vehicle for teaching Spanish. Acquisition of Spanish literacy, however, continued to be viewed as the primary goal of the system.[24]

Programs and Policies from 1968-80: The Revolutionary Military Government and Affirmative Action[25]

The first Belaunde government ended amidst cries of corruption and a serious internal split in his party. The military intervened in October of 1968, and General Juan Velasco Alvarado became the head of the self-proclaimed Revolutionary Government of the Armed Forces. Scholars have debated the nature of the regime and its policies; all assessments turn on how the conflicting intentions within the leadership are weighed and which part of the regime's policies and initiatives are examined.[26] A critical shift does take place after Velasco departs in 1975 and as the economy worsens.

Debate about the military government centers on whether it was committed to the construction of "a fully participatory social democracy" and an end to previous forms of political and social domination, or whether it was primarily motivated by concerns of social control. In either event, the military was convinced by 1968 that civilian governments were incapable of responding effectively to the threat of social disorder and that only a response from the military could restore internal stability.

A number of the military government's initial policies challenged what many Peruvians felt were the invidious consequences of Western models of development: specifically, increasing economic dependence upon the United States for capital and technology, lagging national development as foreign-owned industries exported raw materials and profits, and the marked economic inequity in Peruvian society. The entrenched power of the oligarchy was exemplified by the belief that "40 families" controlled the vast majority of wealth in Peru. The Revolutionary Military Government proclaimed that it would forge an independent nationalistic alternative that would be "neither capitalist nor communist."

In pursuing that course from 1968 until 1974, the military government undertook a series of reforms. During this process, the military government's most important affirmative action initiatives were: its efforts with regard to the rural campesino sector, its efforts in educational reform, and its fledgling development of a new orientation toward women and their role in Peruvian society.

The Agrarian Reform Law of 1969. In June of 1969, the military government undertook a massive agrarian reform, with the goal of breaking the entrenched oligarchy's hold on the commercial coastal plantations and highland haciendas. Rural unrest had continued throughout the Belaunde regime. In the mid 1960s, the army was used to quell a substantial guerrilla movement in the central sierra. That experience played a critical role in convincing the military government of the need for a more substantial reform in the rural areas.[27]

Unlike Belaunde's reform, the law promulgated in 1969 specifically restructured the industrialized sugar plantations of the coast and highland sierra livestock haciendas. The 1969 law replaced the old structures with cooperatives that combined workers, technicians, and the state in the ownership and governance of the new entities. The agrarian cooperatives were to resolve the contrasting problems of minifundia and latifundia that characterized pre-1968 land tenure, through joint ownership of land, shared profits, and a participatory decision-making structure designed to include representatives from all sectors of the new organization. The military's model for agrarian reform, and the organizations they instituted, assumed a commonality of interests in the countryside and particularly among the peasantry.

From the outset, the military government identified the agrarian reform as an instrument to end the historical inequity of the peasantry. In announcing the law, Velasco proclaimed:

> Today, the Day of the Indian, the Day of the Peasant, the Revolutionary Government is making the best of all tributes to him by giving the whole nation a law which will end forever an unjust social order. . . . Today Peru has a government determined to achieve the development of the country by the final destruction of ancient economic and social structures that have no validity in our epoch.[28]

Changing the name of the June 24 celebration from Dia del Indio to Dia del Campesino was another indication of the government's response to the problem of national integration. In short, it would speed up mobility by deemphasizing ethnic distinctions.[29]

Most observers of the agrarian reform argue that it produced a pattern in which the upper levels of the peasantry and the most privileged members of the agricultural sector (such as wage earners on the highly industrialized coastal plantations) benefited disproportionately.[30] In part, this resulted from political constraints upon the government and the diversity of conditions they faced in the rural sector. Formulating a policy that addressed rural diversity and, at the same time, alleviated inequity among the rural population, proved difficult.

The military government's efforts to emphasize a more communal, cooperative organization in the rural indigenous communities met with resistance, as did their efforts to redistribute wealth. In the first instance, there was little interest in a socialistic, communal reorganization because experience had led comuneros (members of the communities) to develop more individualistic strategies. In the second instance, the efforts at increased egalitarianism ran counter to the strategies developed to gain influence in the larger society by all strata of the local communities. Opposition to the law was so marked that the law was never effectively implemented in the campesino communities.[31]

Implementing the government's agrarian reform law also ran into difficulties on the large coastal plantations where most of the reform's beneficiaries were located. Permanent workers wanted to restrict membership rights in the new cooperatives, barring temporary laborers from participation. Consequently, temporary workers, the most disadvantaged workers on the coastal plantations, never fully benefited from the law.

The Agrarian Reform of 1969 represents the most significant affirmative action of the military government toward the rural Indian sector. Nevertheless, it could neither address nor resolve the host of inequities faced by that population. On the other hand, there is some evidence that experience in the self-managed cooperatives established under the Agrarian Reform of 1969 gave rise to a new sense of social solidarity and political authority among peasants who qualified for membership.[32]

One of the principal changes during the course of the agrarian reform was the creation of the National Agrarian Confederation--the CNA--in 1974. The CNA was the idea of those in the government who realized the agrarian reform had not yet benefited the most disadvantaged in the rural sector. The organization linked delegates from agrarian leagues, formed throughout the country, to a General Assembly at the national level. The CNA became an outspoken forum for peasant concerns. As

McClintock reports: "The CNA proved active and ambitious. Its goals included integration of the Peruvian peasantry, [and] the support of rural development efforts."[33] The military, under the more conservative leadership of Morales Bermudez, after 1975 felt compelled to shut down the CNA just as it was "threatening to become an effective political representative of the Sierra peasantry."[34] Despite the military's efforts to destroy the CNA, there is evidence for its continued impact. In December 1982, the Latin American Weekly Report credits the CNA with a major role in the two-day national protest against government agricultural policies.[35] Such evidence suggests that organizations created as part of the military's efforts at affirmative action have not disappeared and continue to play a role under the current (again, Belaunde) government.

Education. Because education is such a central aspect of affirmative action toward disadvantaged groups, the problematic history of the military government's Education Reform of 1972 helps demonstrate the constraints upon their affirmative action efforts. The military government's policies[36] in education focused on making schools more relevant to the actual conditions of people's lives. This took the form of creating "nuclear" schools structured to address the needs and concerns of the entire community, adults as well as children. The hope was to end the enormous educational concentration in Lima and on the coast, to improve the quality of education available to rural citizens, and to rid the schools of their outmoded reliance on rote memorization.[37] In the urban areas, particularly in Lima, there was also an attempt to equalize relations between private and public school systems.

The government had difficulties with the reform almost from its inception. Peasant parents reacted strenuously to an early decree (Decreto Ley 006) that would have required secondary school students to pay to repeat classes they failed. Since failure and repetition are exremely common, this regulation was tantamount to eliminating access to secondary school for the sector of the rural population that had just achieved a sufficient financial level to enroll a child. The law was changed, but only after demonstrations against the law were summarily put down by the military at the cost of lives and injuries. Significantly, the demonstrations took place in Huanta, a town in the heavily indigenous department of Ayacucho.[38]

Aspects of the education reform ran into further difficulties in the rural areas when a teachers' strike--over salaries and benefits--prevented completion of the school term in 1977. Rural parents, despite complaints about mestizo teachers, value education. They saw the government's inability to resolve the teachers' strike and provide sustained schooling as a signal failure. The significance of this failure for peasants is underscored by Webb's point that one of the few returns rural and poor citizens receive from the state is the provision of education.[39]

The Velasco government attempted some creative reform in language policy. The recognition of Quechua as a second national language was an important example of affirmative action in this area. The 1961 census indicated that 40 percent of the Peruvian population spoke a native language, and that about 6 million Peruvians speak Quechua. The teaching of Quechua never expanded significantly and many rural parents expressed doubts about the utility of learning Quechua. On the other hand, the legal standing of Quechua allowed the use of the language in law courts, and consequently the possibility of presenting a claim in one's own language. The new obligation of the courts to respond to peasants in their own language marked a potential shift in the balance of power between Indian and mestizo. The impact of this change was first apparent under the provisions of the military's 1969 Agrarian Reform Law, which allowed peasants to present their grievances to the Agrarian Tribunal in Quechua.[40]

Literacy never received the concentrated attention of a government program, despite the figures in 1961 that showed less than 40 percent literacy for the rural areas as contrasted with an urban population that was 85 percent literate. The government identified the eradication of illiteracy as one of its objectives in the two major statements of government policy, but as the government's conflicts with teachers over wages and the implementation of the educational reform increased, the active pursuit of a literacy program never developed. One area where some attention was paid to the problem of literacy was in the government's concern with the situation of women in Peruvian society. The military made some fledgling attempts to develop affirmative action in this relatively untapped area of public policy.

Affirmative Action and the Peruvian Woman. The military government was unique for its attention to the status of women in Peruvian society. Women had been enfranchised in 1955; however, their economic and political participation lagged far behind that of men and patterns of educational achievement in both the urban and rural areas remained below that of men.

Gender presents a number of contrasts with ethnicity as a focus for affirmative action. It is far less ambiguously identified than ethnicity in Peru and far less open to alteration. Women do not lose their gender identification with a change in residence, or language. While gender simplifies some of the complexities of policies based on ethnicity, it presents a new set of problems for policy-makers. The issues that emerged in Peru are not particular to that nation. Rather they are common to the efforts of societies attempting to develop laws to remedy inequity between the sexes. For Peru, these issues were phrased as follows: How can the government elaborate programs to achieve sexual equality in the face of cultural values that seriously question changes in women's roles? How can policy effectively distinguish the issues of class, economic status, and gender? For instance, how can government policy on gender take into account the enormous differences in the circumstances of upper-class-elite wives, women of the squatter settlements surrounding Lima, and the campesina women of indigenous communities?

As early as 1973, the military government appointed COTREM, Committee for the Reevaluation of Woman, which was the first state body charged with coordinating the efforts of various women's groups. A year later, the National Council of Peruvian Women was revitalized, attracting to its membership a range of women, both academics and activists.[41] The efforts of both these national organizations were aided by the preparations underway for the United Nations Decade of the Woman, launched at the international meeting in Mexico City. The military government declared in 1975 the Year of the Peruvian Woman, and a number of policy-oriented studies were undertaken to develop a fuller understanding of the actual situation of the Peruvian woman.[42]

Even prior to the UN initiatives, the military government had identified the problem of women's status as one of the issues they intended to address when taking power. Revealing those plans in 1974, Velasco listed in Item 23 of Plan Inca an analysis of the situation of the Peruvian woman and the government's goals with respect to this issue.

The government described the situation as one in which women were not effectively exercising their rights as citizens; they suffered restricted access to high-level positions in politics and administration. Women were discriminated against in employment and compensation, and men could exercise unilateral control over property in marriages. Special note was made of the difficult situation of the single mother and the abusive treatment of men toward women. The objective of the government was simply stated: to achieve effective equality between men and women in rights and obligations. To do that, the government indicated that it intended to encourage women's participation at high levels of government, eliminate discriminatory treatment that limited opportunities or affected the rights and dignity of women, promote co-education, and guarantee that the common property of a marriage could not be disposed of unilaterally by the husband.[43]

By 1974, a government spokesman reported that the Civil Code had been modified through a governmental decree to allow for the participation of both spouses in the administration of common property.[44] While noting the continuing problems women encounter in economic discrimination and in education, the report states there had been some increase in the number of women counted among the economically active population. Nevertheless, continuing inadequacies in the compilation of census statistics on labor force participation and the severe underestimation of women's contributions that result from this have not yet been adequately addressed.[45]

With regard to education, women were also to become the beneficiaries of the educational reform. However, in the rural areas, women's education continued to lag severely behind that of men. There were some attempts to insert new images of women into school texts and COTREM developed and distributed some pamphlets using cartoons that pointed out the contradictions in women's position. Attempts by schoolteachers to teach boys and girls the same skills were often met with parental resistance, especially if this included teaching sewing or embroidery to the boys.

In light of its promise to open up occupational opportunities for women, the military began a small program of recruiting women into the armed forces and the police force. These were all reserve units and one crack drill team that was frequently put on display at parades. In 1979, over 200 women graduated from a police academy course designed to prepare them to help tourists, to direct traffic--especially around schools--and to assist the police in cases of child disappearance. This specialized assignment of tasks maintained the division of labor between male and female officers.

When the military's Plan Tupac Amaru was issued in 1977, Title 30 addressed the situation of the Peruvian woman and identified its goal as the reappraisal of women's situation and their progressive incorporation into the active life of the country. In addition to the issues raised in Plan Inca, the military government added improving women's access to training programs, particularly in the public sector, and giving special emphasis to campesino women. The plan called for the end to illiteracy and an increase in female school attendance. It pledged the government to work for more effective application of co-education, to create initial education centers (day care), and to permit women greater access to the productive life of the country. It encouraged the diffusion of programs with a new image of women through the educational system and the media.

Finally, the plan pointed out the need to modify restrictive provisions in the civil code and labor legislation that limit women's rights. At the same time, the government hoped to widen state actions that protect mothers and children.

Despite the concerns expressed in Plan Inca and later in Plan Tupac Amaru, military government policy did not always adequately promote affirmative action to increase women's participation in the full range of social, economic, and political life. The agrarian reform is a particularly poignant example of this failure. Despite the law's many shortcomings, it was recognized as fostering major changes in the rural areas. Nevertheless, the Agrarian Reform Law of 1969 ignored the central role of women in agriculture and proved disadvantageous to them. In accordance with the provisions of the law, the male head of household, rather than the family, received title to the land or membership in the cooperative. The Agrarian Reform failed to take into account women's contributions to agricultural production, left their inheritance claims vulnerable in some cases, and severely restricted their participation within the new production structure.[46] Women's treatment under the law is an important example of how a reform, designed to assist a disadvantaged sector, often assumes too much about the homogeneity of interests within the affected group.

Parts of Article 30 of Plan Tupac Amaru were accomplished when the 1979 Constitution explicitly included equal rights for women in Article 2.2: "All people have equality before the law without discrimination on the basis of sex, race, religion, opinion or language. Man and woman have equal opportunities and responsibilities. The law recognizes for the woman rights no less than those of the man."[47]

The debate over this provision of the 1979 Constitution demonstrates the difficulties of policy that must recognize the enormous impact of social and economic class on the experience of different groups of women, as well as the commonality of their situation as women. This dilemma emerged in the debates over the article on women's rights, and centered on whether there should have been a special provision for the "exploited and dominated" woman, distinguishing her condition and the responsibilities of the state toward her from that of the middle-class bourgeois woman. No such provision gained enough supporters and the thrust of the Constitution is to treat all women similarly.

Other aspects of the 1979 Constitution that have particular reference to women do not necessarily constitute affirmative action. For instance, the Constitution provides for equal pay in Article 43: "The worker, man or woman, has the right to equal remuneration for equal work performed in identical conditions for the same employer." Occupational segregation by sex seriously blunts the effectiveness of this provision.[48]

On the other hand, the Constitution specifically addresses the problem of illiteracy and makes its eradication a priority task. The Constitution requires the president of the republic to give an account of illiteracy each year. While the constitutional provision does not state it, illiteracy is a particularly female problem in Peru.[49]

Conclusions

By the mid-1970s, one could catalogue a series of affirmative action efforts by Peruvian governments, including programs directed at broadening access to resources, services, and legal rights, and aimed to lessening inequity among Indians, mestizos, and whites as well as between men and women. The programs were not all successful. Affirmative action poses special problems to developing countries like Peru where inequalities are particularly complex and the resources available to governments distinctly limited. Despite the efforts of both civilian and military governments to achieve reform, the policies of both remained vulnerable to the critical economic decline that occurred after 1974.

National governments in Peru have had to deal with a series of hard choices in their policy formulations, such as the trade-off between growth and redistribution. The policies that did develop in the 20th century have been a part of state expansion and the consolidation of control over the rural areas. Policy initiatives, particularly in the case of the agrarian reforms, have been prompted in part by peasant demands and militant actions in organizing land invasions. Social fear remains an important impetus to government action.

The implementation of government policies has been restricted by the peculiar difficulties posed by cultural pluralism, the complexity of land tenure patterns, political constraints, and the weak institutional structures upon which affirmative action programs had to be built. Also important have been citizen responses to government initiatives: when government policy was in conflict with strategies previously developed by peasants, implementation was often unsuccessful.

Despite the range of laws that were introduced, the marked decline of the Peruvian economy after 1974 has severely limited the impact of those laws. By 1978, the financial crisis had necessitated the acceptance of highly restrictive IMF policies. This curtailed almost all reform initiatives, and threatened to reverse some previous gains.

The results of affirmative action policy seen in this light suggest that inequality was eased somewhat in the contemporary period, most explicitly from 1968 to 1974. However, great disparities persist and gains are easily reversible. The question is, to what extent is improvement due to long-term trends of change, such as ethnic redefinition, or to explicit government policies. A second question is, How long will the positive impact of affirmative action persist in the face of economic crisis? Certainly, government programs to expand public schools, followed by efforts to make those schools more relevant to the needs of Peruvians, speeded ethnic identification as mestizos. Similarly, the expansion of the cash economy into the sierra opened up new commercial occupations for many peasant families. The agrarian reform changed the ownership patterns of the larger estates, yet, as with education, the long-term meaning of the reforms is inevitably tied to larger trends in the economy and social structure.

With regard to the impact of government efforts to ameliorate inequality, the Peruvian case suggests the following factors may be important. First, economically phrased policies and solutions are vulnerable to shifting economic currents. Hence, for affirmative action to have a long-term effect in a nation like Peru, it must create mechanisms for access to the sources of political influence and decision-making. In Peru, the ability to organize and sustain political access for the disadvantaged along ethnic lines has been limited by the fluidity of ethnic identification and the option of ethnic mobility as an alternative to political mobilization.

Some aspects of affirmative action programs, however, are likely to have broader implications and wider meanings for Peru. Specifically, the attitudes peasants developed in their agrarian cooperative experience, over time, may lead to new forms of political and economic participation. The persistence of an organization like the CNA, long after it has lost government support, suggests another long-term consequence of affirmative action. Similarly, the military government's attention to women's status and its attempts to promote fuller integration and equity for women in Peruvian society have fostered the growth of a range of women's organizations. Associations of women lawyers have been responsible for presenting critiques of the civil code. Further, organizations of professional women have developed that seek to end discrimination against women not only in professional life, but throughout the occupational structure. Also, a host of feminist organizations have been created, many of which have action programs directed toward the poorest strata of women.[50]

In short, just as citizen response to policy is critical for its implementation, so, too, the consequences of affirmative action may be more widespread than the particular policies implemented. This last point raises two related questions that, while not addressed in this paper, seem central to a consideration of the impact of affirmative action policies and of comparative importance in speaking about the impact of such policies internationally. To wit, do affirmative action policies and attempts at implementation result in changes in the national society's perception of the disadvantaged group? Secondly, do these policies and their implementation result in changed consciousness among the recipient group of their situation and the ways in which it might be addressed? Certainly, in the Peruvian case, there seems to be some evidence for this latter pattern, among both peasants and women.

Finally, the consideration of affirmative action in Peru raises two additional theoretical concerns for comparative studies. First, it may be helpful to distinguish between policies that are phrased in terms of maximizing equality and those, such as the Peruvian situation, that are phrased in terms of lessening inequality. Second, as this case study demonstrates clearly, the success or failure of policies depends upon the perspective from which we measure success. Success may be achieved in attitude change and organizational growth that, while not explicitly conceived of as part of the initial policy, are significant, unintended, and long-term consequences.

NOTES

1. R. Nyrop, Peru: A Country Study. Foreign Area Studies, Washington, D.C.: The American University. 1981: 92.

2. This paper does not address the particular problems posed by the Indian population of the selva. The cultural diversity of that region combined with recent economic development efforts makes it an especially complex situation, and beyond the scope of this paper.

3. This point is best made in Julio Cotler, Democracia e integracion nacional. Lima: Instituto de Estudios Peruanos. 1980.

4. Richard C. Webb, Government Policy and the Distribution of Income in Peru. 1963-1973. Cambridge, Mass: Harvard University Press. 1977:6.

5. David Scott Palmer, Peru: The Authoritarian Tradition. New York: Praeger. 1980: 11.

6. On this process see Susan C. Bourque and Kay B. Warren, Denial and Reaffirmation of Ethnic Identities: A Comparative Examination of Guatemalan and Peruvian Communities. International Area Studies Programs, University of Massachusetts, Amherst, Program in Latin American Studies, Occasional Papers Series, No. 8, 1978; Henry F. Dobyns and Paul Doughty, Peru: A Cultural History. New York: Oxford University Press. 1976; and Pierre Van den Berghe and George Primov, Inequality in the Peruvian Andes: Class and Ethnicity in Cuzco. Columbia: University of Missouri Press. 1977.

7. Thomas M. Davies, Indian Integration in Peru. Lincoln: University of Nebraska Press. 1974: 155.

8. Ibid. and Henry F. Dobyns, The Social Matrix of Peruvian Indigenous Communities. Cornell Peru Project Monograph. Ithaca: Cornell University Anthropology Department, 1964.

9. Fernando Fuenzalida, ed. El indio y el poder en el Peru. Lima: Instituto de Estudios Peruanos. 1970; and Enrique Mayer "Mestizo e Indio: el contexto social de las relaciones interetnicas" in Fernando Fuenzalida, op. cit.

10. Van den Berghe and Primov, op. cit. p. 256.

11. Mayer, op. cit.

12. Ibid.

13. Fuenzalida, *op. cit.*, p. 82. On the other hand, one must bear in mind that the vast majority of immigrants remain in squatter settlements surrounding Lima and experience much more limited mobility. See Peter Lloyd, *The Young Towns of Lima*. Cambridge University Press, 1980, for a useful discussion of the general pattern found in the squatter settlements. See also Jorge Osterling, *De campesinas a professionals*, Lima: Pontificia Universidad Catolica del Peru, 1980, for recent patterns of social mobility.

14. Davies, *op. cit.*, p. 160.

15. Cleaves and Schurrah, noting the highly skewed landholding patterns in rural Peru, estimate that prior to the agrarian reform laws, the upper 14 percent of the landholders possessed 76 percent of the land in private hands while 83 percent of the independent farmers worked on property of five hectares or less. See Peter Cleaves and Martin Schurrah, *Agriculture, Bureaucracy and Military Government in Peru.* Ithaca: Cornell University Press, 1980: 31-32.

16. Susan C. Bourque and David Scott Palmer, "Transforming the Rural Sector: Government Policy and Peasant Response," in Abraham Lowenthal, ed. *The Peruvian Experiment*. Princeton: Princeton University Press. 1975: 195.

17. The plight of the *comuneros*, of the sierra indigenous communities, is suggested by McClintock's report that in 1960 "although peasant communities constituted less than 25 percent of the productive land, they included about 40 percent of the rural population." Furthermore, she observes, "The average employee on the coastal enterprise earned at least double the income of the average peasant community resident." Cynthia McClintock, *Peasant Cooperatives and Political Change in Peru*. Princeton: Princeton University Press. 1981: 73-74.

18. Dobyns, *op. cit*.

19. Robert Drysdale and Robert G. Myers, "Continuity and Change: Peruvian Education," in Abraham F. Lowenthal, *op. cit.*, pp. 256-58.

20. Mario C. Vazquez, *Educacion rural en el Callejon de Huaylas: Vicos*. Lima: Editorial Estudios Andios. 1965; Norman Gall, "Peru's Educational Reform." American Universities Field Staff Reports. West Coast South America, Parts I-IV, 1974; and George Primov, "The School as an Obstacle to Structural Integration Among Peruvian Indians." *Education and Urban Society*, 10:209-22. 1978.

21. Drysdale and Myers, *op. cit*.

22. Vazquez, *op. cit.*, and Gall, *op. cit*.

23. Primov, op. cit., raises some important questions about the failure of rural schools to teach literacy and suggests that in Peru this failure has maintained the power of mestizos over Indians.

24. Drysdale and Myers, op. cit.

25. Furnish points out that "military governments in Peru are an accepted part of the legal system and govern through laws and official acts, constrained by highly refined customs and even constitutional principles." Dale Furnish, "The Hierarchy of Peruvian Laws: Context for Law and Development," American Journal of Comparative Law 19:1, 1971, pp. 91-120.

26. Debate over the nature of the military regime abounds. Some of the best assessments can be found in Cotler, op. cit.: Lowenthal, op. cit.; David Scott Palmer, "Revolution from Above: Military Government and Popular Participation in Peru, 1968-1972," Ithaca: Cornell University. 1973; and Luis Pasara, "El proyecto de Velasco y la organizacion campesina." Apuntes 4:8, 1978, pp. 59-80.

27. See Victor Villanuerva, Nueva mentalidad militar?, Lima: Editorial Juan Mejia Baca, 1969, for this interpretation.

28. Paul Sigmund, ed., The Ideologies of the Developing Nations. Praeger, New York, 1972, p. 400.

29. E. H. Epstein, "Education and Peruanidad: Internal Colonialism in the Peruvian Highlands," Comparative Education Review 15:1971: 188-201, and Dobyns and Doughty, op. cit.

30. Bourque and Palmer, op. cit., 204 report that "by 1974 about 10 percent of rural families had benefitted from the 1969 law. Two-thirds of the benefits went to those on the coast, not in the sierra. The law itself when completed would only benefit approximately 40 percent of all farm families and less than 10 percent of the campesino communities." For similar estimates and fuller discussions of the impact of the Agrarian Reform Law of 1969, see Cleaves and Schurrah, op. cit.; McClintock, op. cit.; and Mario Valderama, 7 Anos de Reforma Agraria Peruana 1969-1976. Lima: Pontificia Universidad Catolica del Peru, 1976.

31. For a discussion of the problems of the agrarian reform in the indigenous communities, see Bourque and Palmer, op. cit.; Susan C. Bourque and Kay Warren, Women of the Andes, Ann Arbor: University of Michigan Press. 1981: 270-271; and Norman Long and Bryan Roberts, Peasant Cooperation and Capitalist Expansion in Central Peru. Austin: University of Texas Press. 1978.

32. McClintock, op. cit., notes that among members of the cooperatives, both political consciousness and political activity developed (319-20).

33. Ibid., 38.

34. Dennis Gilbert, "The End of the Peruvian Revolution: A Class Analysis," Studies in Comparative International Development, XV:1, 1980, pp. 15-38.

35. Latin American Weekly Report. December 1982.

36. Several assessments of the impact of the Educational Reform of 1972 are available. In addition to Gall, op. cit., and Drysdale and Myers, op. cit., see Carlos Malpica, "Education and the Community in the Peruvian Educational Reform." International Review of Education 26:3; 1980: 357-67; and R. G. Paulston, "Education, Revolution and Nationalism in Peru." School and Society 99: 1971: 361-64.

37. Primov, op. cit., has described the political consequences of this process.

38. Gall, op. cit.

39. Webb, op. cit., 84.

40. Palmer, op. cit., 1973, has noted the significance of this change for Indians in the Ayacucho region of the Andes.

41. Virginia Vargas, "El movimiento Feminista en el Peru: Balance y Perspectivas." Paper delivered at annual meeting of the Latin American Studies Association, Washington, D.C., 1982:3.

42. Among the current studies available, see Esther Andradi and Ana Maria Portugal, Ser Mujer en el Peru, Lima: Ediciones Mujer y autonomia, 1978; Maruja Barrig, Cinturon de Castidad, Lima: Mosca Azul, 1979; Teresa Burga and Marie France Cathelat. Perfil de la mujer Peruana, Lima: Fondo del Libro del Banco Industrial del Peru, 1981; Elsa Chaney, Supermadre: Women in Politics in Latin America, Austin: University of Texas Press, 1980; Carmen Rodriguez de Munoz y Elsa Roca de Salonen, Compilacion y analysis de leyes sobre la condicion juridica y social de la mujer Peruana, Lima: Universidad nacional major de San Marcos, 1978; Violetta Sara La-Fosse, Carmen Chira y Amelia Fort, Participacion Economica y Social de la Mujer Peruana, Lima: UNICEF, 1981; and Vargas, op. cit.

43. Plan del Gobierno Revolucionario de la Fuerza Armada, Lima: Comite de Asesoramiento de la Presidencia de la Republica. 1974. Plan de Gobierno Tupac Amaru. 1977.

44. Mario Zolezzi Chocano. "La revaloracion de la mujer en el Peru. Analysis y perspectivas," Convergence. 8:1, 1975. 41-48.

45. Sara La Fosse, op. cit., 20.

46. Ibid., 21: Bourque and Warren, op. cit., 183-87.

47. Discussion of the constitutional debates is based upon interviews with Gabriela Porto de Powers in April 1981. Porto de Powers was the only woman to sign the 1979 Constitution. She has written a commentary on aspects of the new Constitution that affect women's lives, "La Mujer Frente a la Constitucion Politica del Peru" (n.d.).

48. Indicators are that occupational segregation has increased over the past 20 years with fewer women finding work in the manufacturing sector, which is by far the most coveted position for urban workers. Migration has also exacerbated women's competitive disadvantage. See Bourque and Warren, op. cit., for a fuller discussion of this process. Marta Tienda has explored the consequences of this process for children and explicitly addressed the inherent policy implications in "Economic Activity of Children in Peru: Labor Force Behavior in Rural and Urban Contexts." Rural Sociology 44:2, 1979: pp. 370-91.

49. According to UN figures, Peru has one of the highest female illiteracy rates in South America, 51 percent. Rural illiteracy rates are two and one-half times as high for women as for men. Women represent 63 percent of the country's monolingual Quechua or Aymara speakers.

50. Vargas, op. cit.

AFFIRMATIVE ACTION IN THE UNITED STATES

William L. Taylor

> Our Constitution is color-blind and neither knows nor tolerates classes among citizens.
>
> Justice John W. Harlan, dissenting in Plessy v. Ferguson, 163 U.S. 537, 559 (1896)

> In order to get beyond racism we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.
>
> Justice Harry Blackmun, concurring in part in Bakke v. Regents of California, 438 U.S. 265, 307 (1978)

I. INTRODUCTION

For most of the history of the United States, race has been an important factor in the allocation of employment opportunities, educational services, and other public and private benefits.

Justice Harlan spoke in dissent at the end of the 19th century when the United States government was struggling with the issue of whether black people, having emerged from slavery, were entitled to the benefits of full citizenship. The majority of the Supreme Court in the Plessy case, deciding in the negative, placed the imprimatur of the Constitution on an official caste system imposed in the region of the nation where most black people lived. Under that system, blacks were segregated by law in public schools, barred from opportunities for higher education, and excluded or relegated to secondary jobs in government. State laws mirrored and often sanctioned prevailing mores that barred black people from training opportunities and skilled jobs in the private market and discriminated against them in wages and working conditions in the jobs they did hold.

Outside the South, the caste system was not as embedded in law,[1] but public policy both tolerated and fostered widespread discrimination

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in public education, in colleges and professional schools, and in the job market, both public and private.

Other racial or ethnic groups that were identifiable by skin color were also subjected to parts of the official caste system. In the Southwest and West, for example, Hispanic Americans were segregated by law in public schools, Asian Americans were barred from many public and private jobs, and American Indians were subjected to widescale discrimination.[2]

For women, there is also a history of legal disabilities parallel in many ways to the second-class status imposed on minorities. Justice William Brennan summarized the history as follows:

> Throughout much of the 19th century the position of women in our society was, in many respects comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children.[3]

In the latter part of the 19th and well into the 20th century, women were denied education and job opportunities through widely accepted convention and the imposition of state laws ostensibly designed for their protection. Thus, in upholding a state law limiting the hours that women could work in factories, the Supreme Court said that there was ample justification for the

> . . . widespread belief that a woman's physical structure, and the functions she performs in consequence thereof, justify special legislation restricting the conditions under which she should be permitted to work.[4]

Although barriers of discrimination were lowered to a degree, particularly outside the South, in the first half of the century, the official caste system sanctioned by Plessy held sway for more than a half-century. It was not until 1954 that the Supreme Court ruled that racial classifications imposed by government for the purpose of separating blacks from whites violated the equal protection guarantees of the United States Constitution.[5] The Brown decision marked the beginning of the modern civil rights era. In the quarter-century since Brown, national policy has been adopted, often only after conflict and upheaval, to prohibit discrimination on the basis of race, national origin, religion, sex, or other invidious distinctions in education, employment, and all other important institutions of American life. This policy--in the form of statutes, court decisions, and presidential orders--has been directed toward the elimination of discriminatory practices previously engaged in or sanctioned by government and toward the adoption of remedies that promise to eliminate the effects of past discrimination.

It is in this historical context that a current controversy has arisen over the use of race and sex-conscious policies in the allocation of employment and educational opportunities as a means for advancing the mobility of groups that have been victims of discrimination. The issue is the one posed by Justice Blackmun--whether "to get beyond racism we must first take account of race."

II. CURRENT AFFIRMATIVE ACTION POLICIES

Government policies requiring or encouraging the conscious use of race and sex as a remedial device in allocating jobs or educational opportunities generally are grouped together under the heading of "affirmative action."[6] The principal affirmative action policies of the federal government that currently are in operation may be summarized as follows.

A. The Prohibition of "Unintentional" Discrimination in Employment

The major expression of national equal opportunity policy in the field of employment is in Title VII of the Civil Rights Act of 1964.[7] In enacting Title VII, Congress for the first time established an obligation on the part of all but the smallest employers and unions to accord equal treatment to workers in hiring, training, promotions, and conditions of work. The law was based on a recognition of the need for strong corrective measures to redress the history of discrimination against minorities and women, as exemplified by the following provision:

> . . . the court . . . may order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without backpay. Sect. 706(g).

Perhaps the single most important occurrence in the evolution of equal employment law was the determination by the agency administering the law (the Equal Employment Opportunity Commission) and the United States Supreme Court that the mandate of Title VII could not be fulfilled simply by prohibiting practices intentionally designed to deny opportunities to minorities. The rationale for this determination was that in a society marred for years by pervasive discrimination, practices that are not racially motivated may nonetheless operate to disadvantage minority workers unfairly. Accordingly, in the landmark case of Griggs v. Duke Power Company,[8] the Supreme Court applied Title VII to invalidate general intelligence tests and other criteria for employment that disproportionately excluded minorities if such tests are not shown to be dicated by business necessity. The tests used by the Duke Power Company were not found to be deliberately discriminatory, but the Supreme Court concluded that:

> Good intent . . . does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability. 401 U.S. at 424.

Under Griggs, employers are not required necessarily to abandon "conventional selection criteria" for the allocation of job opportunities, but they are required to be conscious of the racial effects of applying such criteria. If the methods used disproportionately exclude minorities or women, the employer must seek alternative selection devices that do not have a discriminatory impact and that also serve the employer's interest in having an efficient and trustworthy work force.[9] In other words, the employer's obligation is to identify selection criteria that will serve his need for a productive work force without disproportionately screening out minority or female applicants.[10]

While the Griggs doctrine invalidates employment practices that are not shown to be purposefully discriminatory, the basis for the principle does rest on the history of past discrimination. In Griggs itself, the Duke Power Company had previously intentionally excluded minority applicants from its work force. For the Court to have permitted past exclusionary practices to be replaced by a "neutral" device that adversely affected minorities would simply have resulted in the perpetuation of past discrimination. But the decision was also based on a

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recognition that, apart from the employer's past practices or current intentions, the tests being used were inequitable because the disproportionate failure rate of minorities was traceable to discrimination by other institutions in American society. As the Supreme Court said in a later decision:

> Griggs was rightly concerned that the childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the rest of their lives.[11]

In effect, the courts have rejected a narrow view that would focus exclusively on the question of fault, absolving employers and unions who are not badly motivated even at the cost of marring permanently the opportunities of people who have suffered discrimination. Instead, the law has been interpreted to permit practical intervention at points where it is possible to create opportunities that have been denied in the past.

The Griggs principle has been applied to require revision of other selection criteria and methods that have a discriminatory impact on minorities and women:

1. The reliance of employers and unions on word-of-mouth contact as a means for recruiting new employers. Such methods have an adverse impact on minority workers because they generally have less access to these informal networks, especially when the existing work force is largely white.[12] Employers have been required to substitute systems specifically designed to recruit minorities, e.g., visits to black colleges and universities, recruitment through minority organizations and media with a minority audience, use of minority employees to recruit others.[13]

2. The use of minimum height and weight standards as requisites for jobs in law enforcement and other fields. Such requirements screen out many women and also have an adverse impact on Hispanic Americans and other ethnic groups.[14] The discarding or relaxation of these minimums (which often have been found invalid predictors of job performance) has facilitated the entry of women into police, fire-fighting, and correctional jobs from which they had long been excluded.

3. The use by employers of arrest records as an absolute bar to employment. Many members of minority groups grow up in environments where crime rates are high and people are often arrested on "suspicion." They are adversely affected by such requirements despite the fact that they would be honest and reliable employees.[15]

4. The practice of some unions and employers, particularly in the construction trades, of favoring relatives of current employees for new positions. Such policies, whether or not racially motivated, have been found to perpetuate the effects of past exclusion of minority workers.[16]

Some selection criteria, however, have received a degree of legal protection even though they have an adverse impact on minorities and women. The most prominent example is seniority systems, usually adopted by agreement between unions and employers, which base promotions and protection from layoffs on length of service. The Supreme Court, recognizing protections written into the 1964 statute for "bona fide" seniority systems (Section 703[h]), has held that such systems are not unlawful simply because they perpetuate the effects of discrimination that occurred before 1964.[17] Such systems, however, must be modified to provide redress (in the form of retroactive seniority) to employees discriminated against after 1964.[18]

B. The Obligations of Government-Aided Institutions

Over the course of the past four decades, Congress and the president have determined in various policy pronouncements that there is a national interest in securing increased participation in employment, training, and educational opportunities by groups that have suffered exclusion from such opportunities in the past. To further this national interest, the federal government has called upon institutions which it assists or with which it does business to take affirmative steps to improve participation by minorities and women--often without a prior specific determination that the institution itself practiced discrimination. The measure most widely in use at the present time is a requirement that such institutions establish numerical goals for increasing the representation of minorities and women and timetables for meeting the goals.

1. Government contractors: employment

Since the issuance of an executive order by President Franklin D. Roosevelt on the eve of World War II, the federal government has pursued a policy of prohibiting racial discrimination in the employment practices of businesses that hold contracts with the government. In the years after the war, the order had very little impact, although the country's growing defense industry brought increasing numbers of corporations and workers under its coverage.[19]

A significant strengthening of the policy came in 1961 when President Kennedy issued a new order establishing a duty on the part of federal contractors to undertake "affirmative action" to ensure equal employment opportunity in all company facilities.[20]

The Kennedy order was the first modern articulation on a national level of the concept of affirmative action.[21] It was based on the view that a simple termination of overtly discriminatory practices might bring little actual change. The order also reflected a belief that, if employers would cooperate, the time and resources of the contract compliance program would be well spent in developing new channels of opportunity for minorities rather than solely in assessing culpability for past discrimination. Accordingly, federal officials emphasized specific affirmative steps--e.g., visits to black colleges, contacts with minority organizations and media--that employers would take to increase minority participation in their work forces.

As the program has evolved, the Department of Labor requires contractors to undertake an evaluation of their patterns of employment of minorities and women in all job categories. The employer is then required to identify obstacles to the full utilization of minorities and women that may account for their low participation and to develop an affirmative action plan to overcome the obstacles identified.[22] The affirmative action plan may include measures for improved recruiting, new training programs, revisions in criteria for hiring and promotion, and other steps.

While gains were made in the 1960s, many companies went through the litany of affirmative action steps in a perfunctory way without securing significant changes in the employment of minorities and women workers. Out of the experience grew the concept of "goals and timetables" for the employment of minorities and women, applied first in the construction trades and later to all contractors.

Employers are asked to compare their utilization of minorities and women in the available and relevant labor pool, a determination that may vary with the industry and the location of the contractor's facility. Where the analysis reveals underutilization, the contractor is required to develop goals and timetables for fuller participation.[23]

The goals set, generally expressed in a range (e.g., 12 to 16 percent), reflect assessments of the available numbers of minorities and women who possess the needed skills and of the ways those numbers could be increased through training programs. The goals are objectives, not fixed requirements, since no penalties are imposed for failure to reach them as long as a contractor can demonstrate that he has made good-faith efforts to comply. Nor are employers compelled to hire unqualified persons or to compromise valid hiring standards to meet the established goal.

The courts have upheld the validity of the contract compliance program, including its provisions for goals and timetables, in part as an exercise of the federal government's authority to enlarge the manpower pool available to meet national needs. Claims that the program involves an impermissible use of race and conflicts with congressional policy against requiring an employer to grant preferential treatment simply because of imbalances in the work force have been rejected.[24]

2. Government contractors: minority business enterprise

The federal government also has used its contracting and grant-making authority to encourage the development of minority-owned business enterprises, by seeking to assure that such enterprises receive a share of the work on government projects.

A recent expression of this national policy was a provision included by Congress in the Public Works Employment Act of 1977 requiring state and local governments, absent a waiver by the Department of Commerce, to use 10 percent of federal funds granted from public works to procure services from businesses owned or controlled by members of minority groups. The groups specified were "Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts" and the "set-aside" for members of these groups was based on general congressional findings that their limited participation in public contracting opportunities reflected the current consequences of past discrimination and disadvantage.[25]

In 1980, in a 6 to 3 decision, the Supreme Court upheld the constitutionality of this set-aside provision as an appropriate exercise of congressional spending power. The Court rejected claims of the contractor that the act gave "select minority groups" a preferred standing in the construction industry, saying that the program was remedial in character and was designed to place the groups "on a more equitable footing with respect to public contracting opportunities."[26]

3. Federal employment

The federal government places its own personnel managers under obligations similar to those imposed on government contractors to assure increased participation by minorities and women in the federal work force. Under Title VII of the 1964 Act, the Civil Service Commission (now replaced by the Equal Employment Opportunity Commission) is responsible for reviewing plans obtained from each department and agency "to maintain an affirmative action program of equal employment opportunity."[27]

The courts also have applied the Griggs doctrine to require the modification of aptitude tests for federal employment which adversely affected the job prospects of minorities and which were not shown to be job-related.[28]

4. Government-aided educational institutions: affirmative admissions policies

Under various laws, the federal government provides substantial assistance in the form of grants, guaranteed loans, and other subsidies to public and private colleges and universities throughout the nation. As a condition of obtaining such assistance, Congress has required that recipient institutions refrain from discrimination on the basis of race, national origin, sex, or handicapped status in the admission of students.[29]

The regulations promulgated under these civil rights laws by the Department of Education require that institutions that have engaged in discrimination take "affirmative action to overcome the effects of prior discrimination."[30] Unlike the requirements of the contract compliance program, however, institutions of higher education have not been ordered to take concrete steps except upon a determination that they themselves practiced discrimination.

Very few such determinations have been made, and most of the controversy over race-conscious admissions policies of colleges, universities, and professional schools centers around affirmative admissions policies that some of these institutions have adopted voluntarily to comply with the spirit of national policy. See Section II D, infra.

C. Numerically Based Remedies in the Courts

As indicated in Section II D, much attention of the federal courts has been focused on examining the impact of seemingly neutral selection criteria on minorities and women and determining whether such standards are job-related. Like federal agencies, however, courts have found that where practices that have led to the exclusion of minorities and women are long-entrenched, a simple abandonment of them may not produce significant change.

Thus, in their search for efficacious remedies, courts, having determined the existence of discrimination, have often found it advisable to issue orders that provide yardsticks for measuring change. Typically, a court may require that a specified percentage of all new hires be members of the group discriminated against until a specific goal of minority participation in the work force is reached. As with goals and timetables, the ultimate objective is set with reference to the proportion of minority workers in the available and relevant labor pool.

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In Carter v. Gallagher,[31] for example, a federal court found that the Minneapolis Fire Department had illegally discriminated against minorities. The court ordered that one of every three new employees hired by the department be a qualified minority person until at least 20 minority workers were employed. In other cases, e.g., where unvalidated tests have operated as an exclusionary device, courts also have ordered the establishment of separate eligibility lists for white male and minority women candidates and their selection from the top of each list in a proportion established by the court.[32]

Although these kinds of orders are more stringent than goals and timetables in that they prevent employers from filling vacancies until proportionate numbers of minority and women candidates are found, the courts do not view such orders as imposing strict quotas. The orders do not require employers to hire any candidate who is properly determined to be unqualified for the position. Nor are the remedies permanent in character; courts have stressed that once the goal of minority participation is achieved, past discrimination will be deemed to have been remedied and the employer or union will no longer be subject to fixed hiring requirements.[33]

Further, courts have tempered their orders by considering the interests of nonminority workers in protecting the status they have attained. So, for example, one court of appeals, while sustaining a numerical requirement for new hiring, barred a similar requirement for promotions on grounds that it would interfere with the "established career expectancies of current employees."[34] Similarly, while courts will award retroactive seniority to persons who have been discriminated against to "make them whole" for their injuries, the orders generally will not displace nonminority workers from positions they already hold.[35] And while the law is not completely settled, it appears that the results of affirmative actions, including those embodying numerical requirements, may be undone when an employer finds it necessary to reduce his work force and follows an established seniority system in deciding which employees to lay off.[36]

Despite these limitations and qualifications, numerically based remedies have been widely employed to gain entry for minorities and women to fields from which they were traditionally excluded. In the private sector, the remedies have been applied to major utilities such as telephone and power companies, to skilled occupations in the building trades, and to remunerative blue-collar jobs in the trucking industry. In the public sector, many of the cases have been directed against police, fire, and correctional departments, which until recently employed few, if any, minorities and women. The use of numerically based remedies has been approved by federal courts of appeals in every region of the nation.[37] The Supreme Court has not spoken definitively on the issue but has refused to disturb lower court decisions requiring numerically based remedies.

D. Legal Encouragement of Voluntary Affirmative Action

As federal equal opportunity law and affirmative action policy have evolved over the past 15 years, some institutions in American society--universities, employers, unions--have decided voluntarily to revise their selection criteria to secure greater participation by minorities and women. Voluntary action has been prompted in part by a tacit recognition by the institutions that their past policies were exclusionary, leaving them vulnerable to legal sanctions, and in part by a growing belief that inclusionary policies serve the larger interests of the institutions (e.g., the interest of universities in diversity, the interest of employers in increasing the pool of qualified employees).

Voluntary race-conscious policies have given rise to legal challenges by white male students and employees aggrieved by decisions to give greater opportunity to minorities and women to compete for positions that ordinarily are limited in number. The legal challenges have resulted in important Supreme Court decisions that define broadly the permissible scope of race-conscious action under the American constitutional legal system.

Where voluntary affirmative action programs are initiated by public bodies such as state universities or governmental employers, the basic issue is whether race-conscious measures designed for remedial or other beneficent purposes violate the Fourteenth Amendment, which prohibits states from denying the equal protection of the laws. In interpreting the equal protection clause, courts ordinarily regard classifications of people by race as highly suspect.

Where affirmative action programs are voluntarily undertaken by private institutions such as employers and unions, the issue ordinarily is not a constitutional one but rather whether such race-conscious programs violate federal statutes prohibiting discrimination.

The Supreme Court addressed the first issue--the constitutional obligations of public bodies--in Regents of the University of California v. Bakke.[38] A new medical school of the University of California was confronted, as were other state-operated professional schools, with extraordinarily low rates of minority admissions. The school's first class enrolled three Asians, but no blacks, Mexican Americans, or American Indians. To overcome this virtual exclusion of minorities, the medical school in 1970 initiated a special admissions program that, in effect, reserved 16 of 100 available openings for qualified minorities. A separate admissions committee reviewed applications for admission to these openings. Alan Bakke, a white male applicant, challenged his exclusion from consideration for any of the 16 places and the admission of minority applicants with lower academic credentials, as measured by standardized tests.[39]

While the Supreme Court ruled in favor of Alan Bakke, the most important aspect of the decision was the expressed view of a majority of the justices that under appropriate circumstances race-conscious actions by public bodies to secure increased participation by minorities are consistent with the U.S. Constitution. The justices differed on the strength of the rationale needed to validate a voluntary affirmative action program. Several members of the Court believed that a history of societal discrimination that prevented members of minority groups from acquiring academic credentials justified a policy of departing from conventional criteria of basing admissions strictly on test performance and grade averages.[40] In contrast, Justice Powell found the concept of societal discrimination amorphous and suggested that remedial programs are more properly based on findings by competent public bodies that government has in the past engaged in unlawful discrimination.[41]

Justice Powell, however, believed that there were other rationales that could sustain race-conscious admissions programs, principally the educational value of having an ethnically diverse body.[42]

For Justice Powell and four other justices, the nub of the problem was the way in which the medical school administered its program. For Powell, the two-track, separately administered system that reserved a specific number of seats for minorities made race the sole factor in creating a diverse student body, in violation of the Fourteenth Amendment. For four other members of the Court, the two-track system meant that whites were being totally excluded from a program subsidized by federal funds in violation of Title VI of the 1964 Civil Rights Act, a statute enacted under the authority of the Fourteenth Amendment to prevent discrimination in federally assisted programs.[43]

The impact of the Bakke decision was to eliminate a handful of programs in which separate admissions systems had been established for minorities. The opinions gave encouragement to the continuation of voluntary programs supported by an articulated desire to redress discrimination or to promote diversity and administered on a unified, flexible basis.

The second issue--the permissible scope for affirmative action by private institutions--was addressed in United Steelworkers of America v. Weber.[44] In 1974, the Kaiser Aluminum and Chemical Corporation and the United Steelworkers Union negotiated an agreement designed to increase black participation in Kaiser's craft jobs from 2 percent to the level of black participation in the area's work force, which was approximately 39 percent. To accomplish this goal, the plan created a new on-the-job training program that reserved 50 percent of the openings for black employees. This allocation resulted in the selection of some black employees over white employees who had accumulated more seniority at the plant. Brian Weber, one such white employee, challenged the plan.

By a 5 to 2 margin, the Supreme Court ruled that the "racial preferences" in the Kaiser plan were a lawful means for eliminating "old patterns of racial segregation and hierarchy."[45] While no record had been made of past illegal action by Kaiser or the Steelworkers Union, the Court believed the plan was appropriately undergirded by a history of societal discrimination, citing studies and judicial findings of the general exclusion of minorities from skilled craft jobs by unions and employers.[46]

While conceding that Title VII, like most civil rights laws, generally forbade the use of race in the selection process, the Court noted that the primary purpose of the law was "to open employment opportunities for Negroes in occupations which have been traditionally closed to them."[47]

Having decided that voluntary affirmative action was consistent with Title VII, the Court found that the specific Kaiser plan was lawful in that it was carefully drawn and did not "unnecessarily trammel the interests of white employees."[48] In reaching this conclusion, the opinion specifically noted that the plan did not require the discharge of white workers, did not ban their advancement (since half of those receiving training would be white), and was designed as a temporary measure to end when the percentage of black skilled craft workers approximated the percentage of blacks in the local labor force.[49]

In sum, the Bakke and Weber decisions gave broad sanction to voluntary use of race or sex as a factor in the selection process for remedial purposes or to serve other societal interests. The general approval of such measures is qualified by a need to assure protection for the legitimate interests of white workers and students by providing for procedural fairness and tailoring the character and duration of the plan to the societal need to be served.

While the current administration has announced its opposition to affirmative action and its disagreement with the Weber decision,[50] the formal regulations and policies of the federal government still encourage and protect such voluntary initiatives.[51]

III. THE IMPACT OF AFFIRMATIVE ACTION

Proponents of affirmative action do not regard it as a self-sufficient strategy for eliminating the effects of discrimination and deprivation, and providing mobility for minorities and women, but as one among several policies (others include education, training, job creation, economic development) needed to achieve that objective. Accordingly, movement or inertia in the status of minorities and women during the period in which affirmative action has been pursued may not permit conclusive judgments about its effectiveness, but rather reflect success or failure in implementing other complementary policies. Moreover, considering the amount of controversy over the policy, relatively little study has been devoted to isolating affirmative action programs as a factor in producing change. Still, it is fair to use whatever tools may be at hand to assess what is known about the effects of a major national policy that has been in operation for more than a decade.

Gauged by the broadest indicators used to determine the relative status of groups in American society, very large numbers of people have not been reached by affirmative action policies. For example, over a period of more than three decades, the unemployment rate for black people has remained discouragingly constant at about twice the rate for whites.[52] In fact, from 1960 to 1977, the participation of black men in the labor force actually dropped from 83 percent to 71 percent.

Similarly, despite small gains, the median income of black families has remained about three-fifths of that of white families for more than two decades. And despite the entry of large numbers of women into the labor force in recent years, their median income is little more than half of the median income of men.

The seeming intractability of the unemployment gap has also meant the persistence of poverty as a problem for minority people. In 1981, more than one of every three black people (34.2 percent) was among the ranks of the poor. While this reflects some progress over a 15-year period (in 1966 two of every five blacks was poor), and a narrowing of the gap between whites and blacks (the rate for whites was 11.3 percent in 1966 and 11.1 percent in 1981),[53] it is clear that very large numbers of black people have not been affected by affirmative action or other anti-poverty programs undertaken during the 1960s.

These gross indicators of economic status and income, however, tend to mask important changes that have been occurring in the occupational distribution and educational attainment of minorities. From 1961 to 1982, for example, the proportion of black workers in the labor force employed in professional jobs increased from 4.6 percent to 13 percent. The proportion of black workers in managerial jobs moved from 2.5 percent to 5.5 percent in the same period. While these gains reflect in part a general restructuring of occupational distribution for American workers, their significance can be gleaned from the fact that gains for whites in the same period were more modest (12.3 percent to 17.3 percent in the professions and 11.6 percent to 12.2 percent).[54]

Encouraging indications of mobility emerge when attention is directed to younger minority groups in the population. In 1968, 12.4 percent of all black women in the 25-34 age category were employed in professional jobs. By 1977, the proportion for the same groups (then in the 35-44 age category) had increased to 18.8 percent.[55] For younger and more educated blacks, the income gap closed far more significantly than for the general population. In 1976, blacks in the age group 25-29 who were college graduates earned 93 percent as much as their white counterparts, a gain of about 12 percent in 12 years.[56] William Wilson, a political scientist who minimizes the continuing impact of discrimination as an explanation for current racial disparities, nonetheless credits fair employment programs and corporate recruitment at black colleges as factors contributing to these gains.[57]

The improved occupational status and growing income of minorities reflect important changes in educational attainment. As recently as 1966, the number of black students attending college was only 340,000. By 1974, black enrollment had risen to 814,000, and in 1982 it was more than 1 million.[58] While part of the increase may be accounted for by the growth of black community colleges, by 1980, 80 percent of black students attended predominantly white institutions. Changes in expectations and prospects for minorities are suggested by the rise in the proportion of black students majoring in business from 5 percent in 1966 to 18 percent, while concentration in occupations traditionally reserved for blacks declined.[59]

Significant change also has taken place in the enrollment of minorities in professional schools--particularly in medical and law schools, which have been targets of affirmative action efforts. Law schools as recently as 1969 had a black enrollment of 3 percent. By 1979, black enrollment had risen to 4.2 percent and total minority enrollment, including Hispanic Americans, Asian Americans, and American Indians, as well as blacks, was at 8.1 percent.[60]

Medical schools, many of which excluded black students until after World War II, had only a 2.7 percent black enrollment in 1968. By 1980, black enrollment had risen to 5.7 percent and minorities were 7.9 percent of the total medical school population.[61]

The magnitude of the change is illustrated by the fact that 3,000 black students were enrolled in medical schools in 1974 at a time when there were only 6,000 black physicians in the nation. Studies showing that significant numbers of minority students come from families of lower income and job status indicate that rising enrollments reflect increased mobility, not simply changing occupational preferences among middle class families.[62]

Evidence that equal opportunity policies have been an important factor in this overall progress can be gleaned from changes in areas and industries that have been the subject of affirmative action initiatives. Bernard Anderson has reported substantial gains in the employment of black workers in managerial and skilled craft positions in the huge Bell Telephone system after the company entered into consent decree in 1973 calling for the initiation of goals and timetables.[63] Similar progress has been reported in the employment of minorities and women in skilled positions in the steel industry following a consent decree in 1974.[64]

Affirmative action initiatives have also helped women gain entry into "nontraditional" occupations ranging from coal mining (where their proportion has gone from 0 in 1973 to 8.7 percent in 1980)[65] to banking (where in Cleveland the percentage of women working as officials and managers rose 20 percent in three years after an affirmative action campaign).[66]

In Philadelphia, where the concept of goals and timetables was first applied, minorities constituted only 1 percent of skilled construction workers in 1969 and 12 percent in 1981.[67] In law enforcement, which has been a special target of litigation and other affirmative action efforts, the numbers of black police officers have risen from 24,000 in 1970 to 43,500 in 1980.[68]

Some of the gains summarized here may be fragile. The managerial positions secured by minority workers are located disproportionately in the public sector--in federal, state, and local government--an area which, after many years of expansion, is now shrinking. In private industry, minorities are still concentrated in the lower skill ranges of each occupational category and many of the positions they hold are regarded as peripheral to the main work of the company. In times of economic recession, the application of seniority principles can have a devastating effect on minority workers.

Yet, with all of these caveats, national equal opportunity policies of the past two decades, including affirmative action, have produced more tangible progress than at any other time in American history.

IV. THE DEBATE OVER AFFIRMATIVE ACTION

From the foregoing discussion, it can be seen that the principal, if not exclusive, rationale articulated for affirmative action policies is that they serve a remedial purpose, i.e., that such programs are necessary to provide equal opportunity for persons victimized by discrimination to compete effectively for educational services and in the job market.

The remedial aim of such policies is to be distinguished from the concepts of "reparations" and "redistribution."

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A program designed to accomplish reparations would include as beneficiaries *all* members of the group thought to be victimized. A program of redistribution would have as its *sole* criterion membership in the group defined to be economically or otherwise deprived. In contrast, affirmative action is not viewed as an end in itself but as a means to equalize opportunity in the competition for the resources that would be made available directly under a program of reparations or redistribution. Under affirmative action programs, membership in a group is not sufficient to avail oneself of benefits; other threshold criteria of *merit* must be met to qualify for job vacancies or positions in a professional school.

Further, while affirmative action policies may serve indirectly other objectives such as power sharing, domestic tranquility, the correction of flawed selection criteria, to the extent they are achieved, they are by-products. Absent the remedial goal, none would provide a sufficient basis under the American legal system for government to mandate the race-conscious policies of affirmative action.

The principal critics of affirmative action have been academicians, politicians, and spokespersons for Jewish and other ethnic groups that have been subjected to private practices of discrimination but that are not ordinarily among the groups defined as protected under race-conscious programs.[69] Employers are notably absent from the leadership of the anti-affirmative-action movement; those who have complained usually confine their protests to the paperwork and bureaucratic requirements of the program.[70]

The common thread of criticism is that racial distinctions of any kind and for any purpose are anathema in the American legal system, that in the words of one opponent they "would reintroduce the hated element of racism into the social fabric."[71] The dangers perceived in policies based on race are several.

Prime among them is the erosion of the *merit system* as the prime method for allocating benefits and status in American society. While some critics acknowledge that affirmative action policies incorporate merit requirements, they argue from anecdotal evidence that in practice unqualified persons have been selected and that ultimately merit requirements will be subverted entirely.

In national terms, they say, the erosion of merit standards will mean a loss in the productive capacity of the nation. In personal terms, the argument is that the preference given to minorities and women is unfair to white males who will lose opportunities to persons less qualified than they. Affirmative action policies are overinclusive, critics claim, because they give an edge to some such as Asian Americans, who as a group are more advantaged (in terms of group income and educational attainment) than others who are left out. The policies are under-inclusive because they ignore groups such as Jews and Italian Americans, which have suffered private discrimination. These groups are overrepresented in some occupations (such as teaching and construction work) because they have been excluded from others and the push for minority representation in the occupations where ethnic groups are concentrated is viewed as double discrimination.

Opponents are not reassured by the description of affirmative action as a temporary expedient because, they predict, if allowed to continue, it will expand to include other groups and ultimately achieve enough support to be made permanent.

Further, critics such as Thomas Sowell view affirmative action as against the long-range self-interest of minorities. Affirmative action, he argues, stigmatizes all members of minority groups in the public eye in that the qualifications of minorities who have achieved high occupational status are regarded as suspect.

Little consensus exists among opponents of affirmative action on what, if any, policy should be substituted. Some would accept elements of the program, e.g., outreach in recruitment to minority colleges and media, remedial education and training that do not involve the use of numerical goals. But almost all proceed from an assumption that in the words of George Gilder, "discrimination has already been effectively abolished in this country"[72] or that it is rapidly being eliminated. Given this assumption, affirmative action policies either provide no help (to poor people whose problems are assumed to stem from causes other than discrimination) or unwarranted help (to "those who are already on the upward-mobile escalator").[73]

Civil rights remedies in this view should be available only to individuals, not groups. In order to qualify for relief, claimants would have to establish that they were subjected to discrimination by the institution against which they are making the claim and that the remedy gives them no more than they would have had absent discrimination.

It is this latter set of assumptions and views that is challenged most sharply by proponents of affirmative action policy. They respond that discrimination still is practiced and that to ignore the continuing consequences of past discrimination is to assume that "history is something that ended yesterday (through passage of a few anti-discrimination laws) and that it has no palpable consequences in the present or future."[74] To argue that racial wrongs against a group can be redressed by individual "race neutral" remedies in which the presumption is against continuing consequences is to insure the perpetuation of discrimination.[75]

Proponents of affirmative action also dispute the other major points of the critics. Far from hindering national productivity, affirmative action is designed to enhance it by providing opportunities for several million people whose potential has been stunted by discrimination.

While recognizing the importance and difficulty of achieving fairness to all, proponents say that courts and government agencies have conscientiously taken account of the interests of white workers and students. Applying seniority principles, for example, the courts have made it plain that white people will not be displaced from positions they hold to remedy a racial wrong, no matter how grievous. In these cases, a minority person who has earned the right to a job that someone else is occupying may not obtain a complete remedy. In others, whites may suffer a loss in disappointed expectations.

Proponents note also the absence of any significant number of documented complaints that merit standards have been violated or challenges by employers to enforcement actions they regard as unfair. Assuming the validity of charges of occasional abuse, they say there is no reason to believe that correcting the abuses requires abandoning affirmative action policy.

As to claims that race-conscious policies will stigmatize minorities, it is important to note that the policies are not ordinarily applied directly to alter ultimate results--to change immediately the number of minority lawyers, master electricians, or corporate executives or to alter income disparities. Rather, affirmative action is being applied at the gateways, in opportunities for professional training and in entry-level positions in business and industry. What is offered is an opportunity to compete, to acquire the necessary training to become a lawyer, master electrician, or business executive. Persons who are able to come through the competition successfully need have no fear of being stigmatized by affirmative action but only by the continuation of long-standing prejudice.

Finally, proponents say that the suggestion of critics that affirmative action as a temporary remedial device will become a permanent system of quotas seriously misconstrues power relationships in the United States. They note that Reconstruction, the major effort of the last century to redress racial wrongs, was terminated by government before effective remedies were provided. Although the economic and political position of black people and other beneficiaries of affirmative action has improved in this century, they remain relatively powerless.[76] Affirmative action policies were adopted and continue because the governing majority perceived the existence of a wrong that required firm corrective measures. It is virtually impossible, proponents say, that affirmative action measures would survive a changed perception that the wrong had been corrected. Indeed, they say that the danger is far greater that such measures will be abandoned before they have a chance to work than that minorities will gain power to institutionalize these measures permanently.

In sum, the dilemma of affirmative action is implicit in Lyndon Johnson's metaphorical exposition of the need for such a policy. He said:

> You do not take a person who for years has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say "You are free to compete with all the others" and still believe that you have been completely fair.[77]

The issue is one of comparative dangers. Critics of affirmative action argue largely from theory that affirmative action runs the risk of advancing minorities to a point in the race that they would not have reached through their own efforts and talents. Proponents respond that there is almost no evidence that affirmative action has had this impact thus far. And they argue from history and experience that the danger is much greater that the policy will be abandoned while the person who has been hobbled by chains is still far behind in the race.

NOTES

1. T. Emerson, D. Haber, and N. Dorsen, *Political and Civil Rights in the United States* (3rd edition, 1967), pp. 1731-35.

2. *Id*.

3. *Frontiero* v. *Richardson*, 411 U.S. 677, 685 (1973).

4. *Muller* v. *Oregon*, 208 U.S. 412, 420 (1908). In an earlier decision, one justice stated his views more baldly, saying that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life." *Bradwell* v. *State*, 83 U.S. 130, 141 (1873) (Bradley, J. concurring).

5. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

6. Reasoned debate is often hindered by the semantic labels attached to such policies. Opponents often talk of "reverse discrimination" or "preferential treatment" policies. Proponents prefer the terms "race conscious" or "affirmative action" policies. Where labels cannot be avoided easily, "affirmative action"--the term most often employed in the statutes--will be used in this paper.

7. 42 U.S.C. §§2000e-2000e-17 (1976).

8. 401 U.S. 424 (1971).

9. *Albermarle Paper Company* v. *Moody*, 422 U.S. 405 (1975).

10. A by-product of *Griggs* has been the discovery through research that many conventional selection criteria previously presumed to be job-related do not actually measure an applicant's ability to perform a given job. General aptitude tests, for example, may not predict whether an applicant will perform well as a steamfitter or fork-lift operator. Rather, such tests have served as a means for winnowing down large pools of qualified applicants without requiring careful scrutiny by the employer.

11. *McDonnell Douglass* v. *Green*, 411 U.S. 792, 806 (1973).

12. See, e.g., *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir., 1970).

13. *United States* v. *Georgia Power Co.*, 474 F.2d 906, 925-926 (5th Cir., 1973).

14. Dothard v. Rawlinson, 433 U.S. 321 (1977); Smith v. City of East Cleveland, 520 F.2d 492 (6th Cir., 1975).

15. See, Gregory v. Litton Systems, 316 F.Supp. 401 (C.D. Calif., 1970), aff'd, 472 F.2d 631 (9th Cir., 1972). Cf. New York City Transit Authority v. Beazer, 440 U.S. 568 (1979), rejecting a challenge to an employment rule that barred people undergoing treatment for drug use as transit workers.

16. See Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir., 1969); U.S. Commission on Civil Rights, The Challenge Ahead: Equal Opportunity in Referral Unions (1977), pp. 84-89.

17. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

18. Id.; Franks v. Bowman Transportation Co., Inc., 424 U.S. 747 (1976). People entitled to relief include not only employees whose applications were denied, but others who were deterred from applying because of a known policy of discrimination.

19. It is estimated that more than 30 million employees currently are covered by the executive order.

20. In its current form, the provision is found in E.O. 11246, II, Sec. 203, 30 Fed.Reg. 12319. In 1967, the order was amended to extend coverage to women. E.O. 11375, 32 Fed.Reg. 14303.

More recently, other groups have been designated as beneficiaries of affirmative action programs. Under Section 503 of the Rehabilitation Act of 1973, government contractors are required to take affirmative action to employ qualified persons who are handicapped. Under Section 402 of the Vietnam Veterans Readjustment Assistance Act of 1974, contractors' affirmative action obligations are extended to disabled veterans and other veterans of the Vietnam era.

21. It was not, however, the first time that the United States government had taken race-conscious actions to rectify a wrong against a particular group. In the years after the Civil War, Congress adopted a variety of programs making available to black people educational assistance, social welfare benefits, and land grants. Many of these programs were not limited to newly freed slaves and were administrered by the Freedmen's Bureau until the end of Reconstruction. See G. Bentley, A History of the Freedmen's Bureau.

22. 41 Code of Federal Regulations (CFR) 60-1:40.

23. 41 C.F.R. Part 60-2 (1974). This provision, known as Revised Order No. 4, applies to nonconstruction contractors. A parallel set of requirements (41 C.F.R. Part 60-4) applies to construction contractors.

24. See, e.g., *Associated General Contractors* v. *Altschuler*, 490 F.2d 9, 16-17 (1st Cir., 1973), *cert. denied*, 416 U.S. 957 (1974); *United States* v. *Mississippi Power and Light Co*., 638 F.2d 899 (5th Cir., 1981), *cert. denied*, 50 USLW 3271 (October 1981). The congressional policy against preferential treatment is contained in Section 703(g) of Title VII.

25. The provision is found in 42 U.S.C. §6705(f)(2)(1976 and Supp. III., 1979). Other assistance to minority enterprise is provided under the Small Business Act. Beginning in 1968, the president directed the Small Business Administration to develop a program to aid small business concerns owned and controlled by "socially and economically disadvantaged" persons to achieve a competitive position in the economy. Pub.L. 85-536 §2(8), 72 Stat. 389; as amended by, Pub.L. 95-507, 92 Stat. 1757; 13 C.F.R. Part 124.

26. *Fullilove* v. *Klutznick*, 448 U.S. 448, pp. 485-86.

27. The requirement is contained in Section 717(b)(1) of the Act. 42 U.S.C. §2000e *et seq*.

28. *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir., 1975).

29. The prohibition against race discrimination in the use of federal funds is contained in Title VI of the Civil Rights Act of 1964. The prohibition against sex discrimination is part of the Educational Amendments of 1972. The ban against discrimination against disabled people is contained in Section 504 of the Vocational Rehabilitation Act of 1973.

30. 45 C.F.R. Part 80.

31. 452 F.2d 315 (8th Cir.), *modified en banc*, 452 F.2d 327 (8th Cir., 1971), *cert. denied*, 406 U.S. 950 (1972).

32. See, e.g., *United States* v. *City of Chicago*, 549 F.2d 415-436-37 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977), remedial order *reconsidered and aff'd*, 631 F.2d 469 (7th Cir., 1980); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir., 1973); *cert. denied*, 421 U.S. 991 (1975).

33. See *Rios* v. *Steamfitters Local 638*, 501 F.2d 622 (2d Cir., 1974). The Supreme Court has suggested that absent discrimination, it is to be expected that work forces will be "more or less representative of the population in the community from which employees are hired." *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, pp. 339-40, n. 20 (1977).

34. *Kirkland* v. *New York State Department of Correctional Services*, 520 F.2d 420 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir., 1975). Cf. *EEOC* v. *American Telephone & Telegraph Co*., 556 F.2d 167 (3d Cir., 1977), *cert. denied*, 438 U.S. 915 (1978).

35. Instead, courts may award monetary compensation to minority workers who must await vacancies in positions they would have held had they not been discriminated against. In contrast, where the "expectations" rather than the "vested status" of nonminority workers is at stake, the courts often reach a different result. In one case, a male employee who was passed over for promotion in favor of a less senior female employee pursuant to an affirmative action plan was held to be entitled to monetary compensation but not the promotion. McAleer v. AT & T, 416 F.Supp. 435 (D. D.C. 1976).

36. See Watkins v. United Steelworkers Local 2369, 516 F.2d 41 (5th Cir., 1975). The question of how to prevent economic recession from wiping out the beneficial effects of affirmative action remedies haas received much discussion. Among the legal remedies that have been suggested are money damages to nonminority employees for the loss of accrued seniority or orders to employers to retain incumbent employees who otherwise would have been laid off. The latter would place the burden on the culpable party--the employer--rather than choosing between the minority victim of discrimination and the nonminority employee who may have benefited from it. Other public policy initiatives, such as work-sharing through reduction of hours or rotation of layoffs, have been proposed to preserve opportunities created through affirmative action, while according fair treatment to senior white workers. See, e.g., U.S. Commission on Civil Rights, Last Hired, First Fired: Layoffs and Civil Rights (1977). In one recent decision, a federal appeals court upheld the right of a company and union to agree voluntarily to modify a seniority system to assume that some recently hired minority and women workers retained their positions during layoffs. Tangren v. Wackenhut Services, Inc., 638 F.2d 705 (9th Cir., 1981).

37. The cases are collected in U.S. Commission on Civil Rights, Affirmative Action in the 1980s: Dismantling the Process of Discrimination (1981), at fn. 60, p. 22.

38. 438 U.S. 265 (1978).

39. No party in the case questioned the validity of the tests that, along with undergraduate grades, are used to predict performance in medical school.

40. The Court was aware, of course, that universities frequently depart from these criteria to admit the sons and daughters of wealthy alumni, to achieve geographical diversity, and for other reasons.

41. 438 U.S. at 307-310. This explicit predicate is often absent from affirmative action programs, since government officials are reluctant to confess the past sins of their agencies.

42. The Supreme Court had previously said that actions by government officials to racially balance elementary and secondary schools would be justified as measures designed "to prepare students to live in a pluralistic society." Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971). But Bakke involved a more difficult question since, unlike public elementary and secondary schools that all children may attend, in colleges and professional schools there is competition for a limited number of places.

43. 438 U.S. at 408 (Stevens, J., concurring in part and dissenting in part).

44. 443 U.S. 193 (1979).

45. 443 U.S. at 200, 204.

46. Id. at 198 n. 1.

47. Id. at 203 (quoting from remarks of Senator Hubert Humphrey) the Court added: "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy" (Id. at 204).

48. Id. at 208.

49. Id. at 208-209.

50. See Leadership Conference on Civil Rights, Without Justice: A Report on the Conduct of the Justice Department in Civil Rights in 1981-82 (February 1982), pp. 41-51.

51. The regulations of the Department of Education authorize affirmative action by universities, even in the absence of prior discrimination to "overcome the effects of conditions" that resulted in limited participation by minorities. 45 C.F.R. Part 80. Guidelines issued by EEOC encourage voluntary affirmative action and provide detailed guidance to employers that can result in an EEOC certification of the lawfulness of their plans, 29 C.F.R. 1608 (1979).

52. In the current recession, the jobless rate for blacks is 18.5 percent (compared with an overall rate of 9.8 percent) and half of all black teenagers are unemployed. The unemployment rate for Hispanic Americans is 13.9 percent. The New York Times, August 7, 1982, pp. 44.

53. The analysis of the 1980 Census is reported in The New York Times, July 20, 1982, p. A1, and July 27, 1982, p. D22. See, also, Malveaux,

"Shifts in the Employment and Occupational Status of Black Americans in a Period of Affirmative Action" in *Working Papers: Bakke, Weber and Affirmative Action* (Rockefeller Foundation, 1979), p. 137 ff.

54. The figures appear in Bureau of the Census, *Current Population Reports*, May 1982. The statistics for earlier years are reported in Malveaux, *supra* note 55 at pp. 148 ff. From 1960 to 1977, blacks as the percentage of total employees in each category increased from 4 percent to 8.4 percent of all professional and technical workers and from 3 percent to 4.8 percent of all managers. At the same time, blacks were moving out of some lower-status jobs, declining from 50 to 35 percent of all household workers.

55. Malveaux, *supra* note 55 at 30.

56. *Id*.

57. Wilson, *Working Papers*, at pp. 170-175.

58. Wilson, *The Declining Significance of Race: Myth or Reality*, Fifth Annual Symposium of University of Pennsylvania Afro-American Studies Program, March 29-30, 1979, p. 8.

59. The proportion of black education majors dropped from 45 percent to 26 percent in the same period.

60. Statistics are drawn from figures cited by the U.S. Commission on Civil Rights in *Equal Opportunity: Affirmative Admissions Programs at Law and Medical Schools* (June 1978), pp. 74-75, and from *Department of Education's Higher Education General Information Survey*. Since law school enrollment burgeoned during the 1970s, the numerical increase in minority students may be even more noteworthy. In 1969, there were only 2,933 minority students, including 2,128 blacks, enrolled in approved law schools. By 1979 there were 10,008 minority students, including 5,257 blacks.

61. Statistics are drawn form the *Journal of Medical Education*, v. 51 (August 1976), p. 692 and v. 55 (December 1980), p. 1042; and *The New York Times*, November 9, 1980, p. 67. During the last decade, the increase in enrollment of women in medical and law schools has been even more striking. In 1971, only one medical student in 10 was a woman. In 1980, one medical student in every four was a woman. These changes are less attributable to specific affirmative action programs than to the elimination of admissions barriers by professional schools and the revolution in perceptions of women's role in working society.

62. See Alexis, *The Effect of Admission Procedures on Minority Enrollment in Graduate and Professional Schools*, in *Working Papers*, *supra* note 55 at pp. 52 ff.

63. See Statement of Bernard Anderson, Hearings before Subcommittee on Employment Opportunities. House Committee on Education and Labor, 97th Cong., 1st session, v. 1, pp. 219-220.

64. See Statement of Phyllis Wallace, House Hearings, *supra* note 65 at pp. 528-529.

65. See *The Washington Post*, April 11, 1982, p. A10.

66. See Statement of Working Women at Congressional briefing (July 22, 1981).

67. *The Washington Post*, April 11, 1982, p. A10.

68. *Id*.

69. The distinction made under such programs is between groups that have been victims of official government policies requiring or sanctioning discrimination and those that have been subject only to private discrimination.

70. Some business people have voiced support for affirmative action, noting that "goals and timetables are a standard management technique for achieving business objectives." See, e.g., statements of Kaiser Aluminum Company executives, *The Washington Post*, April 13, 1982, pp. A1, 6.

71. Statement of Morris B. Abram, before U.S. Commission on Civil Rights, *Consultations on the Affirmative Action Statement*, p. 26. Among other critics whose views are summarized here are John Bunzel, *Consultations*, p. 30; Thomas Sowell, "Equal Opportunity or the Numbers Game"in the *American Educator*, Fall, 1978, p. 11; Nathan Glazer, *Affirmative Discrimination* (Basic Books, 1975).

72. Gilder, "The Myth of Racial and Sexual Discrimination," *National Review* (November 14, 1980), pp. 1381-90.

73. Abram, *supra* note 73 at 29.

74. deLeone, "Creating Incentives for Change," 41 *Christianity and Crisis* (March 1981), p. 92.

75. In American jurisprudence, the outcome of cases often is determined by how the burden of proof is allocated. One justice of the Supreme Court, William Rehnquist, has argued in school desegregation cases that the Court should do no more than to remedy the "incremental segregative impact"--the difference between the segregation that exists now and that which would exist if government had done no wrong. The burden would be on the minority person seeking the remedy. In the film *It's A Wonderful Life*, the protagonist, played by James Stewart, is on the verge of suicide

because he considers his life a failure when a "guardian angel" intervenes. The angel is able to recreate the distressed circumstances of the hero's town, friends and family as they would have been if the hero had never lived, and thus demonstrate to him that his life has not been a failure. The movie ends happily.

But lacking such divine intervention, there is no way in civil rights cases to meet Justice Rehnquist's test of recreating the situation that would exist if the wrong had never occurred. Instead, affirmative action policy seeks more pragmatically to ascertain the steps that will provide victims of discrimination opportunity in the future.

76. One critic, Allen Sindler of Berkeley, has suggested that the political power to perpetuate preferences may come through extension of them to other ethnic groups--"white ethnics from Southern and Eastern Europe" is the example he gives. But the likelihood of such political alliances seems extremely remote and preferences not based on a history of state-imposed discrimination would be subject to legal attack. One extension of affirmative action now being used in some professional schools gives special consideration to applicants who can show that they have overcome a background of economic and social disadvantage to advance as far as they have. This is hardly the official recognition of race or ethnicity that Professor Sindler fears and is arguably a positive contribution to enhancing opportunity.

77. President Lyndon B. Johnson, commencement address at Howard University (1965).

AFFIRMATIVE ACTION IN OTHER LANDS: A SUMMARY

Jack Greenberg

The countries that have been studied for this volume are Malaysia, India, Nigeria, Israel, Sudan, Germany, Yugoslavia, Peru, and the United States.

The participant scholars examined each in an effort to identify whether it employed affirmative action, with regard to which areas of human activity, which techniques it has used, how it has functioned, where it has succeeded or failed, on which grounds it has been justified and criticized.

We have dealt with affirmative action based on race, color, religion, language, and gender, although the latter received only passing, inadequate treatment and deserves a separate, fuller study. Various definitions of affirmative action were used by the participants, but while there were differences, there were no sharp disagreements and there appeared to be no quarrel with employing the definition of the International Convention on the Elimination of All Forms of Racial Discrimination, which was adopted by the United Nations in 1969.

Article I, §4 provides:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The studied countries may be divided into four categories:

1. Countries that have affirmative action in the sense described by the Convention: Malaysia, India, Israel, and the United States. Malaysia may be included in this group, but the favored group, the Bumiputras, are numerically and politically stronger and are committed to

maintaining affirmative programs indefinitely. Consequently, Malaysia is a variant of this category.

2. Countries with what we may call hybrid arrangements, i.e., Nigeria, which has adopted policies of redistribution targeted at particular ethnic or geographical groups, and Peru, which has adopted general political, economic, and social measures designed to aid the vast majority of the population who are Indians. While such policies are not affirmative action in the sense of the Convention, they are similar in purpose. In Nigeria, the policies are combined with some ethnic and regional proportional representation in governmental positions and regional quotas in education.

3. Yugoslavia, which is a federation of nations and nationalities, has had affirmative action within a regional minority area, i.e., Kosovo, where Albanians outnumer Serbians, unlike the rest of the country, where Serbians usually are the largest group. The Kosovo arrangement, however, now has been transformed into discrimination by Albanians against the Serbian minority within that region.

4. Countries that have nothing which might be described as affirmative action, Sudan and Germany.* In these countries, certain disadvantaged groups that are victims of severe discrimination, southern non-Islamic Sudanese, Turkish guest workers in Germany, would seem to be natural subjects for affirmative action, but are not.

Our survey covered a variety of governmental and legal structures pursuant to which affirmative action is effected. An effort to find correspondences between type of political and legal structure, the proportion or characteristics of the population that is subject to affirmative action, the type of affirmative action and how it functions, yielded little. We may conclude, however, that affirmative action policies broadly defined exist in many parts of the world, including nations not included in this study, different kinds of political systems, and with regard to different types and sizes of disadvantaged, or once disadvantaged, groups. In the course of discussion, China and Canada were mentioned as such countries.

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* Discussion developed that the Federal Constitutional Court has decided that access to higher education may not be denied to any qualified person, although it may be delayed, and that certain small quotas should be established for foreign students.

In the United States, affirmative action (except for women) is directed at approximately 15 percent of the population (chiefly blacks and Hispanics) and derives from statutes, judicial decisions, administrative regulations, and private decision-making. There was no discussion describing the United States political system, as it was assumed that the participants were familiar with it.

In Israel, affirmative action is targeted at the Asian/African Jewish population, which has grown to be perhaps more than 50 percent of the total Jewish population. There is also a preference favoring Jews over others in immigrating into the country. There is no affirmative action for the Israel-Arab population as such, although but for ethnicity it qualifies for such policies. The Israeli policies (other than in immigration) derive mainly from nonstatutory, nonjudicially declared official exhortation.

In India, a parliamentary democracy, the policies are constitutional and implemented by regulations. They are targeted at approximately 22 percent of the population consisting of the scheduled castes and tribes, the best known of which are the untouchables. In addition, some states in India have affirmative action programs with respect to education and government employment in favor of groups designated Other Backward Classes.

Malaysia, which has what might be called an authoritarian parliamentary system, requires affirmative action for Malays by its Constitution and throughout its legal system. Malays are 45 percent of the population and other natives are 10 percent; collectively they form 55 percent of the population and are known as the Bumiputras, who are entitled to affirmative action. The remainder is principally Chinese, but includes also Indians and Europeans. The policies are fundamental to the structure of the country and, indeed, to challenge them is a crime.

In Yugoslavia, the one example of affirmative action that we considered was that favoring Albanians in Kosovo province, where they are 70 percent of the population. So far as available materials indicate, the policies have been implemented in a nonformal manner. Yugoslavia is, of course, a socialist, one-party state.

Nigeria is a consociational parliamentary state in which regions and tribes have entered into a constitutional compact assuring a certain degree of autonomy, mutual veto, and proportional representation. Three principal tribes constitute about 50 percent of the population; there are many others.

Peru has a military government. Its policies relevant to this study are directed at enhancing the economic and educational status of Indians, who constitute the vast majority of the population.

Finally, Sudan and Germany, neither of which have affirmative action, are nations in which there are substantial ethnic groups (in Germany, e.g., Turks; in the Sudan, southern non-Islamic Sudanese) who are victims of discrimination and extremely deprived in socioeconomic status.

Notwithstanding the affirmative action provisions of the International Convention quoted above, none of the countries under discussion relies upon the Convention to justify affirmative action policies.

Affirmative action is employed across a broad range of activities but not all countries treat all areas to the same extent. By far the most widespread use of affirmative action appears in Malaysia, where it is applicable to government positions, private employment, business ownership, credit and land ownership. In Kosovo, it appears to be pervasive as well. In India, the policies focus on educational and government employment, in Israel on education. In higher education, it takes the form of special preparatory courses, enrollment in which disproportionately helps Asian-African Jews, but others as well. In the United States, education, governmental and private employment, and the electoral process are subjects of affirmative action. There is also some private effort affirmatively to integrate minorities on corporate boards of directors and to encourage minority small business ownership.

In Nigeria, there are regional quotas for enrollment in higher education that may be translated into ethnic terms. There is also regional and, therefore, tribal proportional representation in governmental positions.

We find no mention of private employment in connection with affirmative action in India, Israel, Nigeria, or Peru.

The results of affirmative action are generally that where it has been employed, it has increased minority participation. In Malaysia, the Malay population has made rapid advances in participation in virtually all sectors except that of business ownership and senior management positions in private industry. In the United Staes, to the extent that scholars have been able to measure, affirmative action has been found to be responsible for marked increases in minority participation in managerial positions and the professions and for moderate gains in higher education. In India, scheduled castes and tribes have substantially increased their presence in government positions, and there has been a substantial increase in literacy as well as participation in higher education. In Israel, affirmative action is focused on education and particularly on special tutorial programs preparatory to university admission, where it has been successful in affording access to Asian-African Jews, who are economically deprived.

In Yugoslavia, the Albanians in Kosovo, who are a majority of the population of that province, although a small minority of the entire country, and who once were severely disadvantaged, now occupy positions throughout the province to an extent that discriminates against the nationaly numerically dominant Serbians, who are a minority in Kosovo.

Each of the countries that have affirmative action policies, except Malaysia, also embraces legal doctrines and social values from which, at the same time, the legal and moral validity of affirmative action has been opposed. In the United States, affirmative action has been advocated and opposed on the basis of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964. In Israel, although affirmative action does not derive from positive legal sources, it has been promoted on the basis of general egalitarian principles, which also have been marshaled to oppose it. In India, the affirmative action provisions of the Constitution are exceptions to the provisions that secure equality. In Yugoslavia, affirmative action has been advocated to promote equality, but it has been argued that it contradicts express provisions that secure equality. Only in Malaysia, as noted above, is it enshrined in the Constitution and placed beyond the possibility of contradiction.

The justifications for affirmative action in each of the countries that employ it ordinarily are not articulated in a definitive way. They usually appear in the course of describing or upholding policies, sometimes judicial decisions, in scholarly commentaries, or political discussion.

1. The justification offered perhaps most frequently is the need to improve the lot of deprived groups in society by redistribution of wealth, income, power, and prestige. This appears in India, Nigeria, Israel, Malaysia, and the United States.

2. Sometimes affirmative action has been justified as a means of righting past wrongs. We find this justification in India, the United States, Yugoslavia, and Israel.

3. Affirmative action has been supported as a method of promoting social harmony by reducing differences among groups. This reason has been offered in Israel, Malaysia, and the United States.

4. Affirmative action also has been propounded on the ground that traditional measuring devices unfairly discriminate among groups. This reason has been used in Nigeria and the United States.

5. Affirmative action has been instituted to promote contact among members of different groups, out of which learning and understanding derive from one another, a rationale employed in the United States with regard to higher education.

6. In one country, Nigeria, affirmative action has been asserted as an expression of community as opposed to individual rights.

7. In Israel, it has been justified as a means of building self-respect of groups who are held in low esteem.

8. In Israel, too, the special affirmative action that facilitates Jewish immigration is justified as a means of nation-building.

Notwithstanding its justifications and frequent success in achieving its objectives, many objections, practical and principled, have been leveled against affirmative action. It is argued that:

1. It does not always reach its intended beneficiaries. In Malaysia, there are "Ali-Baba" front men who nominally control businesses because they are Malays, but in fact the real parties in interest are Chinese or Europeans. This has been seen in the United States, where nominally minority-owned businesses turn out in fact really to be white-controlled.

2. Similarly disadvantaged groups and similarly disadvantaged individuals within groups are not treated equally. For example, in India, only certain disadvantaged castes have received benefits of affirmative action. Others said to be equally disadvantaged have not. Moreover, in India and Malaysia, only certain elites within subject groups have in fact been favored, although official policies are nominally neutral among the groups enjoying such benefits.

3. A related objection is that distribution within each beneficiary group has remained as inequitable as in society as a whole. For example, in the United States, it has been asserted that wealthy black businessmen or professionals have received benefits while the minority population as a whole remains greatly deprived.

4. It is argued that affirmative action philosophically contradicts the ethos of societies like the United States and India, which favors individual over group rights.

5. In societies where affirmative action is justified as securing compensation for those who are victims of an earlier oppressive situation, it often helps those who personally were not victimized at the expense of some who were not oppressors. This has been argued in India, the United States, and Israel.

6. It has been asserted that affirmative action leads to economic or administrative inefficiency by placing unqualified persons in

positions of responsibility. This has been heard in India and the United States.

7. Where affirmative action is advocated as a temporary measure, it may tend to become permanent. In India, it has continued with respect to some Other Backward Classes which now occupy positions of power and prestige but insist upon continuation of the program. It is anticipated by some that the experience will be the same with respect to Scheduled Castes and Tribes where they achieve parity. Related to this is its use on behalf of those (or their families) who are not disadvantaged but have achieved equality with the majority group.

8. Affirmative action is said to disturb harmony and create backlash, as has appeared in the United States in the conflict between Jews, other white ethnic groups, and blacks. In Israel, there is conflict between European and Sephardic Jews; in India, between scheduled castes and others.

9. Affirmative action has been said to lead to low self-esteem of those who have been advanced pursuant to it, and

10. to lower perceived worth of the beneficiaries by others who question their ability to function in positions for which they have been selected.

Virtually all of these objections have their counterparts in the justifications described earlier.

In conclusion, we find that affirmative action is a device used in many kinds of societies, democratic, socialist, authoritarian, consociational, and postcolonial in order to help minorities (or in Malaysia a majority) previously discriminated against to overcome disadvantage in many areas of economic, social, and political life. It has effected some change for some people, often many, as we find in Malaysia, Kosovo, the United States, Israel, and India. It has made a positive difference where other measures have failed. It does not, however, address the basic structure of the economy. That is, an economically stratified economy stays that way, although some members of racial or ethnic groups who had been confined to lower levels may obtain access to upper levels. Other economic and class injustices are not affected, at least directly. Affirmative action is generally associated with opposition to racial discrimination, although it can become discriminatory itself. While it is often the only remedy, it is sometimes susceptible to distortion and abuse.

Affirmative action may be likened to a powerful drug that must be used for a serious illness but should be employed carefully to minimize objections and facilitate the goals it seeks to advance. The paper on the United States indicates that in this country, of which this writer can speak with some familiarity, it has been used appropriately and successfully. Where it has been the subject of litigation before the Supreme Court of the United States, that Court uniformly and sensitively approved affirmative policies. The cases include Bakke, Weber, Fullilove (with regard to employment), United Jewish Organizations (with regard to voting), Swann (with regard to schools). The Court has demonstrated awareness of the needs for and strengths of the policies, as well as their negative potential, and has generally arrived at a constructive balancing of conflicting considerations.